TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. [redacted]7

E. J. COTTON, C. E. COTTON, AND JAMES B. AGAMIR, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF COTTON BROTHERS & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII, BY C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED NOVEMBER [redacted], 1908.

(20,466.)

(20,465.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 159.

E. J. COTTON, C. E. COTTON, AND JAMES B. AGASSIZ, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF COTTON BROTHERS & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII, BY C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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1 Law. No. 5602.

In the Circuit Court of the First Circuit, Territory of Hawaii. In Law. August Term, 1903.

TERRITORY OF HAWAII, by HENRY E. COOPER, Superintendent of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Co., Defendants.

Case.

To the Honorable J. T. De Bolt, 1st Judge, First Circuit Court, Territory of Hawaii:

Your petitioner, the Territory of Hawaii, by (Henry E. Cooper), Superintendent of Public Works, claims of the defendant- above named the sum of Twenty-five Thousand (25,000) Dollars, for damages resulting to plaintiff for injury done to the property of plaintiff by defendants in the following manner, to wit:

1.

That at all times during the month of January A. D. 1902, James H. Boyd was the duly qualified and acting Superintendent of Public Works of the Territory of Hawaii. That on the 6th day of December, 1902, Henry E. Cooper, named herein, became Superintendent of Public Works of the Territory of Hawaii and so continued until the 23rd day of November 1903. That on said last named day C. S. Holloway was duly appointed Superintendent of Public Works of the Territory of Hawaii, and ever since has been and now is the duly qualified and acting Superintendent of Public Works of said Territory.

2 2.

That on or about January 10, 1902, E. J. Cotton, C. E. Cotton and James B. Agassiz were doing business as co-partners in Honolulu and in the Territory of Hawaii under the firm name and style of Cotton Brothers & Co., as contractors, and as your petitioner is informed and believes and therefore alleges on information and belief they have ever since said time and now are co-partners as aforesaid, and doing business as aforesaid.

3.

That on or about the 10th day of January, 1902, the Territory of Hawaii was the owner of a certain Suction Dredge or dredger, together with its appurtenances, then located and used within the harbor of Honolulu.

That said dredge, or dredger, consisted of certain machinery for taking the sand, soil or debris from harbors below water, on which

a certain scow supporting said dredge may float; that the said scow and machinery thereon, constituting said dredge, had no means of self-propulsion, but was entirely dependent upon means other than its own propulsion to be towed from place to place.

That the said dredge, as your petitioner is informed and believes, had never been used outside the harbor of Honolulu.

4.

That on or about the 10th day of January, 1902, the parties hereto made and entered into a written contract whereby the defendants hired from the plaintiff said dredge, together with its appurtenances, to be used by the defendant from January 10, 1902, to January 10th, 1903, which contract is hereby referred to, and a copy thereof hereto attached and made a part hereof, and marked "Exhibit A."

That defendant promised in said contract to take due care
3 of said suction dredge and all machinery, pumps, pipes, pontoons, discharge pipes, ball joints, rubber connections, drill scows and machinery for same, and also all machinery for connecting the same, that the Territory had on hand on January 10, 1902, and by such contract said defendants did agree to return said dredge and said appurtenances aforesaid to the Superintendent of Public Works for the Territory of Hawaii on or before January 10, 1903, in good working order, reasonable wear and tear excepted.

That under said contract the defendants did take into their possession, control and use the property described in said contract.

5.

That the term for which the said dredge and appurtenances were hired has expired, and did expire on the 10th day of January, 1903.

6.

That the defendants so negligently and improperly cared for said dredge, and all the appurtenances thereof that the same were wholly lost to the plaintiff.

That by reason of said negligence and improper care the said dredge was not returned to the plaintiff either on January 10, 1903, or at all, although due demand for the return thereof was made by said plaintiff on said defendants.

7.

That the said dredge described in said contract was reasonably worth the sum of Twenty-five thousand (25,000) Dollars.

8.

That by reason of the failure of said defendants to return the said dredge and machinery described in said contract, and by reason of the failure of the defendants to perform the conditions of
4 said contract as aforesaid, the plaintiff has been damaged in the sum of Twenty-five Thousand (25,000) Dollars, all of which said plaintiff alleges was done in controvention of its private rights under the law.

plaintiff

Wherefore, the (undersigned) asks the process of this Court to cite the said defendants to appear to answer this complaint before a jury of the country at the August Term of the Court unless otherwise sooner disposed of by judicial authority.

Dated at Honolulu, May 21, 1903.

TERRITORY OF HAWAII,
(S'gn'd) By HENRY E. COOPER,
Superintendent of Public Works.

(S'gn'd) LORRIN ANDREWS,
Attorney for Plaintiff.

HONOLULU, *Island of Oahu, ss:*

Henry E. Cooper, being duly sworn, deposes and says that he is the duly appointed and lawful Acting Superintendent of Public Works of the Territory of Hawaii; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his knowledge, except the matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

(S'g'd) HENRY E. COOPER.

Subscribed and sworn to before me this 21st day of May, A. D. 1903.

(S'g'd) JNO. M. KEA,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

5 EXHIBIT A.

(Copy.)

This contract and agreement made and entered into this 10th day of January, A. D. 1902, by and between the Department of Public Works of the Territory of Hawaii, acting in its representative capacity by and through its Superintendent of Public Works, James H. Boyd, who is duly authorized, the party of the first part, and E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business at Honolulu, Oahu, said Territory under the firm name of Cotton Brothers & Company, parties of the Second part, witnesseth:

That in consideration of the said parties of the second part having the use of the Government suction dredge and plant, to consist of the suction dredge and all machinery, pumps, pipes, pontoons, discharge pipes, ball joints, rubber connections, drill scows and machinery for the same, and also machinery for connecting the same, that the Government now has on hand, for the term of one year from the date of signing these presents, the said parties of the second part agree to make complete repairs to the said dredge, its machinery and drill scows, in a sum of not less than Ten Thousand Dollars

($10,000.00), and on completion of the said repairs the same to be inspected by James H. Boyd, Superintendent of Public Works, for his approval and acceptance. And the said parties of the second part also agree to return said dredge and machinery on or before twelve (12) months from the date of this agreement.

And for the consideration aforesaid, the said party of the first part hereby agrees with the said parties of the second part to let them have the use of the said dredge, machinery, pumps, pipes, pontoons, discharge pipes, ball joints, rubber connections,
6 drill scows and machinery for same, and also machinery for connecting the same, that the Government has now on hand, for the term of one year from the date of signing these presents.

And in consideration of these presents, the said parties of the second part hereby agree to keep insured the said dredge, its machinery and drill scows, against loss or damage by fire in a sum of not less than $20,000.00 the same in case of loss to be applied to repairs to said dredge and machinery, or turned over to the said party of the first part, at their option; and they also agree to furnish unto the said party of the first part a satisfactory bond in a sum of Ten Thousand Dollars ($10,000.00), to ensure the return of said dredge and machinery in good working order, reasonable wear and tear excepted. On return of the said dredge at the completion of the said term, the party of the first part to accept the same if in good working order, reasonable wear and tear excepted. Any question arising under the acceptance of the dredge at the expiration of the term above noted, to be settled by a board of arbitration of three members, one to be chosen by each of the parties hereto, and the third to be chosen by the two arbitrators already chosen as aforesaid. And it is mutually agreed that the judgment of the said arbitrators shall be final, conclusive and binding.

In witness whereof said party of the first part, acting in its representative capacity by its Superintendent of Public Works, has caused these presents to be duly signed and subscribed and the seal of the Department of Public Works to be attached by James H. Boyd, the Superintendent of Public Works who is duly authorized, and who hereunto sets his hand as and for the act of said party of the first part, and the said parties of the second part have caused their firm name to be hereunto subscribed by James B. Agassiz who is
7 duly authorized, the day and year first above mentioned.

(Sig.) JAS. H. BOYD, [SEAL.]
Superintendent of Public Works.

COTTON BROS. & CO.,
(Sig.) By JAS. B. AGASSIZ.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 10th day of January, A. D. 1902 personally appeared before me James H. Boyd, Superintendent of Public Works of the Territory of Hawaii, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he, acting for and on behalf of the Territory of Hawaii, executed

the same freely and voluntarily and for the uses and purposes therein set forth, and affixed the common seal of the Department of the Superintendent of Public Works of the Territory of Hawaii thereto.

(Sig.) JOHN M. KEA, [SEAL.]
Notary Public, First Judicial Circuit,
Hawaiian Islands.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 10th day of January, 1902, personally appeared before me James B. Agassiz to me known to be the person described in and who executed the foregoing instrument as the act of the partnership of Cotton Brothers & Company, who acknowledged to me that he was duly authorized to execute the same and that he did so freely and voluntarily for the uses and purposes therein set forth, and as the free act and deed of the said co-partnership.

(Sig.) F. T. MERRY, [SEAL.]
Notary Public, First Judicial Circuit.

(Endorsed:) L. 5602. Filed May 22, 1903. J. A. Thompson, Clerk.

8 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September, 1903, Term.

TERRITORY OF HAWAII, by HENRY E. COOPER, Superintendent of Public Works, Plaintiff,
vs.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Bros. & Company, Defendants.

Case.

Answer.

Now come E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Bros. & Company, and for answer to the plaintiff's declaration herein deny each and every allegation therein contained.

E. J. COTTON,
C. E. COTTON,
JAMES B. AGASSIZ,
Partners, Doing Business under the Firm Name of Cotton Bros. & Company.
(S'g'd) By Their Attorneys, ATKINSON & JUDD,
(S'g'd) HARTWELL & BIGELOW.

Dated Honolulu, T. H., June 10, 1903.

(Endorsed:) Filed June 12, 1903. Henry Smith, Clerk.

9 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. —— Term, 1903.

TERRITORY OF HAWAII, by HENRY E. COOPER, Superintendent of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the firm name of Cotton Bros. & Co., Defendants.

Case.

Stipulation that Complaint be Amended.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the complaint in the above entitled action be amended as follows:

That the word "Case" be inserted in said complaint opposite the names of the parties thereto, and it is hereby agreed that the Clerk may make such amendment upon the original complaint.

That in the title of the said cause the word "August" in August Term, 1903, be changed to September Term, 1903, and that the Clerk be authorized to make such change.

That on page 3 of said complaint, the third line from the botton of the page, the words "August Term" be changed to read September Term, and that the word "September" be substituted in the summons wherever "August" appears in the phrase "August Term," and that the clerk be authorized to make such change.

(S'g'd) PHILIP L. WEAVER,
Attorney for Plaintiff.

(S'g'd) ALFRED S. HARTWELL,
Attorney for Defendant-.

Honolulu, June 8th, 1903.

10 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, by HENRY E. COOPER, Superintendent of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the firm name of Cotton Brothers & Co., Defendants.

Case.

Defendants' Request for Instructions.

The defendants ask that the instructions be given to the jury which are written on the pages hereto appended, and numbered consecutively from 1 to 8.

COTTON BROTHERS & COMPANY,

(S'g'd) By Their Attorneys, ALFRED S. HARTWELL.

Dated May 26th, 1904.

1.

The plaintiffs claim $25,000 "for damages resulting to plaintiff for injury done to the property of the plaintiff by defendants." The injury complained of is that the defendants having under a written agreement hired from the plaintiff a suction dredge and its appurtenances, then located and used in the harbor of Honolulu, and having promised to take due care of the property and to return it on or before January 10, 1903, in good working order, reasonable wear and tear excepted, "so negligently and improperly cared for said dredge and all the appurtenances thereof that the same were wholly lost to the plaintiff."

Given. Gear, J.

11 The written agreement does not contain a stipulation to take due care of the property, but the law requires this to be done whether expressly agreed upon or not. On the other hand the express agreement that the defendants would return the property at the end of the term "in good working order, reasonable wear and tear excepted" is nothing more than the law would require if not expressly agreed.

150 U. S. 331. 37 L. E. 1100.

The law applicable to this agreement is that the loss of the property from no fault or negligence of the defendants is a sufficient excuse for failure to return it.

The hirer is bound to take due care of the property hired, and if it is lost without his fault or negligence, he is not liable.

2.

The defendants as lessees of the dredger had an insurable interest which they had a right to insure against perils of the sea, both for the protection of their business interests in contracts undertaken by them, and of their interest as lessees. This action is not brought for the insurance money. The defendants' recovery of that money in no way affects their liability in this case, and will not be taken into consideration by you, nor will you allow it to have any influence on your verdict.

Given. Gear, J.

3.

This agreement allowed the defendants "the use of the government suction dredge" without confining the place of use to any particular locality. Using the dredge for dredging out the entrance of Pearl Harbor may be presumed to have been contemplated by both parties, consequently the defendants are not necessarily chargeable with negligence by the mere fact of using the dredger at that place, whether the plaintiff expressly agreed that it might be used there or not.

Given. Gear, J.

If the plaintiff agreed or consented to the use of the

12 dredger at Pearl Harbor that is an additional reason why it cannot complain of such use.

4.

The plaintiff cannot recover unless it is shown to your satisfaction by a preponderance of the evidence that the defendants were negligent in placing the dredge upon the bar at the entrance of the channel, leading to the mouth of Pearl Harbor or that the dredge was not moored as securely as reasonably prudent men under similar circumstances would have moored it, if dealing with their own property, or else that the defendants omitted to take such action to prevent the loss as would have been taken by reasonably prudent men with their own property.

Given as modified. Gear, J.

By the COURT:

The burden of proving negligence rests on the party alleging it. And where one party charges negligence on the part of another as a cause of action he must prove the negligence by a preponderance of evidence and if the Jury find that the weight of the evidence is in favor of defendants or that it is equally balanced, then plaintiff cannot recover and the jury should find for defendant.

4½.

Additional instruction asked by defendants.

(*a.*)

The burden is not upon the defendants to show that they used proper care, whether as to mooring the dredge or as to using all the pumps or as to the efficiency of their engineer or other employees. In the absence of evidence showing the lack of proper care in these matters the presumption is that due care was taken.

Given. Gear, J.

5.

The defendants were not bound to take any unusual or extraordinary precautions to guard against loss of the dredge, nor are they liable for loss resulting from failure to take such precautions. The care which was required of them was the ordinary care which would ordinarily be taken by men of average judgment in dealing with their own property, similarly situated, under similar circumstances.

13

Given as modified. Gear, J.

By the COURT:

Ordinary care depends upon the circumstances of each particular case and is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances.

6.

If you shall find that there were acts or failures to act by the defendants which appear to you to constitute negligence on their

part; nevertheless if the loss of the dredge
Given. Gear, J. could not reasonably have been anticipated as a probable result of their course, they are not [will]*
liable, and you ∧ find for the defendants.

Motey *v.* Pietle & Co., 74 Fed. 155; 20 C. C. A. 3[6]*6.

Given by the Court as its own instruction:

The court instructs you that every person must be held liable for all of those consequences which flow naturally and directly from his act or which might have been foreseen and reasonably expected as a result of his conduct but not for those consequences which do not flow naturally and directly from his acts, or which he could not have foreseen or reasonably anticipated as the result of his conduct.

If you believe, from the evidence that the defendants were guilty of negligence as charged against them and that the injury complained of was the natural consequence of such negligence
14 and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence should be considered the approximate cause of the injury. If you believe from the evidence that the injury complained of was occasioned by the acts of the defendants, still if you further believe from the evidence that such injury was not the natural result of the acts of defendants and could not have foreseen or reasonably expected to result from the conduct of defendants then defendants would not be liable. An act is not to be deemed the proximate cause of the injury unless the injury was such a consequence of the act as, under the surrounding circumstances of the case might and ought to have been foreseen or anticipated by an ordinarily reasonable and prudent man as reasonably likely to flow from the act.

7.

It was not the defendants' fault if the dredger was not strong enough to be used in dredging at
Given as modified. Gear, J. Pearl Harbor, and if its loss was owing to its not having requisite strength for that use, which facts the defendant did not know nor have such means of knowing as would put a reasonably cautious and prudent man upon inquiry, the defendants are not liable and are entitled to a verdict in their favor.

8.

The plaintiff having averred in its complaint the loss of the dredger, and that the loss occurred, from the defendants' negligent and improper care of it, the burden is upon
Refused. Gear, J. the plaintiff to prove that the loss occurred from the cause alleged. If the plaintiff fails to prove this by a preponderance of evidence, it cannot recover.

Additional instruction asked by def'ts.

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*[Word and figure enclosed in brackets inserted in pencil by clerk, W. R. S.]

(*a*) 9.

In regard to the value of the dredge, the jury may consider
15 the fact that the dredge could be replaced by a new and more efficient dredge and also the fact that part of
Refused. Gear, J. the dredge property returned is valued at $10,800.

(*b*) 10.

There is no evidence tending to show that the first moorings or the remoorings were not such as experienced
Refused. Gear, J. men would use for securing the dredge, in the position in which she lay.

(*c*) 11.

No presumption in the absence of evidence if there is no such evidence can be made that the engineer or other men employed on the dredge were not efficient and capable men
Refused. Gear, J. for the work in which they were employed, or that they failed to perform their duty faithfully. This is a question of fact to be determined by the Jury and if there is such evidence.

(Endorsed:) Filed May 27th, 1904. Wm. R. Sims, Clerk. Hartwell, Att'y.

16 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, by HENRY E. COOPER, Superintendent of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Bros. & Co., Defendants.

Case.

Defendants' Request to Modify Instructions Proposed to be Given at Request of Plaintiff.

The Court having proposed to grant Instruction No. 11 requested by plaintiff, modifying the same by erasing the words "unsafe and imprudent," and inserting in place thereof the words "not such an act as a careful and prudent man would do in relation to his own property," defendants now request the following addition to such modification, namely:

"Or else was consented to or agreed upon by the plaintiff or was necessary or naturally incident to taking the dredge to Pearl Harbor for the purpose of dredging out its entrance."

COTTON BROS. & CO.,
By Their Att'y, ALFRED S. HARTWELL.

May 28, 1904.

17 Gentlemen of the jury you are the sole judges of the facts in this case, and of the credibility of the witnesses. You have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence, or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly. Your verdict must be unanimous, That is all twelve of you must agree in order to bring in a verdict.

18 In the Circuit Court of the First Circuit, Territory of Hawaii, April Term, 1904.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,
v.
COTTON BROS. AND CO.

Verdict.

We, the jury in the above entitled cause find for the Plaintiff and assess and award damages in the sum of $25,000 Twenty-five Thousand Dollars.

(Sgd.) J. A. McCANDLESS, *Foreman.*

Honolulu, T. H. May 27th, 1904.

(Endorsed:) Filed May 27th, 1904. Wm. R. Sims, Clerk.

19 In the Circuit Court of the First Circuit, Territory of Hawaii. In Law. September Term, 1903.

TERRITORY OF HAWAII, by HENRY E. COOPER, Superintendent of Public Works, Plaintiff,
vs.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Co., Defendants.

Case.

Before Gear, J.

Defendants' Motion for a New Trial.

(1) The defendants move the Court to make an order granting a new trial of the above entitled cause on the ground that the verdict of the jury in said cause was and is contrary to the law and evidence, and was duly excepted to by the defendants as such; and more particularly, because there was no evidence tending to show negligence or want of proper care of the defendants, and because the jury failed to deduct from the sum of Twenty five Thousand ($25,000.00) Dollars which the plaintiff claimed as damages for failing to return

the property delivered to the defendants under the contract referred to in its complaint the sum of Ten Thousand Eight Hundred ($10,800) Dollars shown by undisputed and admitted testimony to be the value of the portions of that property returned by the defendants to the plaintiff.

(2) And for errors of law occurring during the trial to which exceptions were noted by the defendants, and

(3) For errors in the admission and rejection of testimony which exceptions were noted by the defendants.

20 (4) And for the refusal of the Court to give instructions requested by the defendants and for giving certain instructions requested by the plaintiff, to which exceptions were noted by the defendants.

Dated, Honolulu, May 31st, 1904.

COTTON BROTHERS & COMPANY,
By Their Attorney, ALFRED S. HARTWELL.

Notice of Motion for a New Trial.

To E. C. Peters, Esq., Deputy Attorney General,

Take Notice: That the above motion will *re*represented for argument at 9:30 o'clock a. m. on Friday the 3rd day of June next, or as soon thereafter as counsel may be heard.

Dated, Honolulu, May 31st, 1904.

ALFRED S. HARTWELL,
Att'y for Defendants.

[Friday 3"]*

(Endorsed:) Filed May 31 1904. George Lucas Clerk.

21 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, by HENRY E. COOPER, Supt. of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Before Gear, J.

Defendants' Motion to Extend Time for Filing Bond.

Defendants move that time for perfecting motion for new trial by filing bond as required by statute be extended forty-eight hours from date basing this motion on the affidavit hereunder written.

COTTON BROTHERS & COMPANY,
(Sgd.) By Their Attorney, ALFRED S. HARTWELL.

Dated June 7, 1904.

* [Word and figure enclosed in brackets erased in pencil by clerk, W. R. S.]

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Personally appeared before me Alfred S. Hartwell, attorney for the above named defendants, who on oath deposes and says: That the verdict in said cause was rendered upon Friday, May 26th last; that upon May 31st following defendants' motion for new trial was filed herein, costs were paid, and a sum of money deposited with the Clerk for costs of motion if defendants should fail to sustain the same being the sum stated by the Clerk of this Court as sufficient for that purpose, but filing no bond that defendants would not to the detriment of plaintiff remove or otherwise dispose of prop-
22 erty "liable to execution on such judgment," there being no judgment entered therein.

That said motion was set for argument on Friday, June 3rd last being the eighth day after said verdict was rendered; that at the time set for argument of said motion defendants' counsel appeared, but plaintiff's counsel sent word to the Court that he was not ready, being otherwise engaged; whereupon argument on said motion was postponed at the request of plaintiff's attorney until this Tuesday, June 7th, at which plaintiff's attorney moved that defendants' motion be dismissed for failure to file a bond as above mentioned, having given no intimation previously of his intention so to do.

Wherefore this affiant respectfully submits that he waived the same.

(Sd.) ALFRED S. HARTWELL.

Subscribed and sworn to this 7th day of June, A. D. 1904, before me.

(Sd.) ALFRED T. BROCK,
[SEAL.] *Notary Public.*

To E. C. Peters, Deputy Attorney General:

Take Notice that the above motion is filed with Judge Gear for such action as he may think proper to take without hearing counsel unless desired by you.

June 7, 1904.

(Sgd.) ALFRED S. HARTWELL,
Defendant's Attorney.

Endorsed: Filed June 7" 1904, Wm. R. Sims, Clerk.

23 In the Circuit Court, First Circuit, Territory of Hawaii, April Term, 1904.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Sup't of Public Works,
v.
COTTON BROS. AND CO.

Before Gear, Judge.

Damages.

Judgment.

This action by petition claiming $25,000.00 damages, came to the August 1903 Term and thence by continuance to the present Term, when the parties appeared and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff to recover $25,000.00 damages.

Therefore it is adjudged that the plaintiff recover of the defendants $25,000.00 damages and his costs taxed at ($20.00) Twenty Dollars.

Entered this 7th day of June 1904, as of April Term 1904.

By the Court:

(S'g'd) WM. R. SIMS, *Clerk.*

(Endorsed:) Filed June 7, 1904. Wm. R. Sims, Clerk.

24 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Case.

Before Gear, J.

Defendants' Further Notice of Motion for New Trial.

Judgment being this day entered against the defendants on the verdict herein rendered against them on May 26 last, the defendants now give notice of their motion herein filed for a new trial, on the grounds therein named.

COTTON BROTHERS & COMPANY,
(S'g'd) By Their Attorney, ALFRED S. HARTWELL.

Dated June 7, 1904.

To E. C. Peters, Esq., Deputy Attorney General.

TAKE NOTICE: That on Tuesday the 14th inst., or as soon thereafter as counsel can be heard, the motion for a new trial filed herein on May 31 last and this day removed upon the entry of the judgment on verdict, will be presented for argument.

COTTON BROTHERS & COMPANY,
(S'g'd) By Their Attorney, ALFRED S. HARTWELL.

Dated June 7, 1904.

(Endorsed:) Filed June 7", 1904. J. A. Thompson, Clerk.

25 In the Circuit Court of the First Circuit, Territory of Hawaii, September Term, 1903.

TERRITORY OF HAWAII
v.
E. J. COTTON ET AL.

Case Before Gear, J.

Judgment May 2[7],* 1904.

H. S. This action by petition claiming $25,000.00 damages came to the present term of this Court, when the parties appeared and were at issue to the jury.

Said cause having been heard and committed to the jury, they found for the plaintiff to recover from the defendants the sum of $25,000.00 damages.

Therefore it is adjudged that the plaintiff herein have and recover of the defendants the sum of $25,000.00 damages and costs taxed at Twenty ($20.00) Dollars.

H. S. Entered this 8th day of June, 1904, as of the 2[7]* th day of May, 1904.

By the Court:
(S'g'd) HENRY SMITH, *Clerk.*

SIRS: You will please take notice that the foregoing is a copy of a judgment duly entered herein in the office of the Clerk of
H. S. this Court on the 8th day of June, 1904, as of the 2[7]* th day of May, 1904, in the above entitled action.

(S'g'd) E. C. PETERS,
Deputy Attorney General.

Dated Honolulu, June 8th, 1904.

To A. S. Hartwell, Esq., Attorney for the Defendants, and to the Defendants and each of them.

(Endorsed:) Filed June 8, 1904. Henry Smith, Clerk Jud. Dep't.

26 Know all men by these presents: That we E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business in Honolulu, in the Territory of Hawaii, under the firm name and style of Cotton Brothers & Company, as principals, and the Pacific Surety Company, a California Corporation doing business in Honolulu, under the laws of said Territory, as surety, are held and firmly bound unto Henry Smith of said Honolulu, Chief Clerk of the Judiciary Department, and to his successors in such office, in the penal sum of Twenty-five Thousand One Hundred Dollars ($25,100), to be paid to the said chief clerk or any his successors

[*Figure enclosed in brackets inserted in pencil by clerk, W. R. S.]

in such office, for which payment well and truly to be made we hereby bind ourselves, the said principals binding themselves and their heirs, executors and administrators, and the said surety binding itself and its successors, firmly by these presents.

The condition of this bond is such that whereas in a certain action on the case pending in the Circuit Court of the First Circuit, of said Territory, wherein the Territory of Hawaii is plaintiff and the above named Cotton Brothers & Company are defendants, verdict for the plaintiff in the sum of Twenty-five Thousand Dollars ($25,000) was rendered upon May 26, 1904, and a judgment on said verdict is this day made in said Court and the said defendants have filed their motion for new trial in said cause,

Now therefore, if the said Cotton Brothers & Company as defendants in said action, shall pay all costs of their said motion, in case they fail to sustain the same, and also shall not to the detriment of the said plaintiff in the said action remove or otherwise dispose of any property they may have liable to execution on said judgment, until the final determination of the whole proceedings so pending in said Court, and also until the final determination before
27 the Supreme Court of the said Territory, to which said motion for a new trial if denied shall or may be taken by exceptions, then the above obligation shall be void, otherwise the same shall remain in full force and effect.

In witness whereof the said Cotton Brothers & Company by their attorney in fact, A. S. Cantin, thereunto duly authorized, have hereunto set their name and seal, and the said Pacific Surety Company has caused its corporate name to be signed and its corporate seal to be attached by John R. Galt, its attorney in fact, this seventh day of June, A. D. 1904.

COTTON BROS. & CO.,
Per A. S. CANTIN, *Att'y-in-Fact.*
PACIFIC SURETY COMPANY,
By JNO. R. GALT, [SEAL.]
Attorney-in-Fact.

Sealed and delivered in the presence of—
E. A. MOTT SMITH.

The sufficiency of the surety and the amount of the penalty in the foregoing bond are approved this 7th day of June, A. D. 1904

GEORGE D. GEAR,
2nd Judge of the First Circuit Court
of the Territory of Hawaii.

(Endorsed:) Filed June 8, 1904. Geo. Lucas, Clerk.

28 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Case.

Before Gear, J.

Defendants' Bill of Exceptions.

The plaintiff brought its action on the case against the defendant claiming $25,000. damages, being the value of certain property hired by the defendants of the plaintiff, and lost, as alleged by the plaintiff, by reason of the negligence and improper care of the defendants.

The said cause coming on for trial before a jury, Gear, J., presiding, and evidence having been adduced both by the plaintiff and by the defendants, and the Court having instructed the jury upon the law, the jury retired to consider its verdict, and thereafter rendered a verdict in court in the sum of $25,000. for the plaintiff.

At the time of the rendition of said verdict, to wit, May 26, A. D. 1904, the defendants excepted to the verdict as contrary to law and the evidence. During the trial of the cause certain exceptions were taken by the defendants to rulings of the Court upon evidence, and also to the giving of certain instructions at the plaintiff's request, as well as to the refusal to give certain instructions requested by the defendants, or to giving the same in a modified form; all of which said exceptions were duly taken and allowed and appear on
29 the transcript of the record made from the stenographer's notes at the trial.

The pleadings, exhibits and transcript of the record are hereby referred to and made part of this bill of exceptions, which being examined by me and found conformable to the truth is hereby allowed, this — day of June, A. D. 1904.

——— ———,
Judge of the First Circuit Court, Presiding at the Trial of Said Cause.

(Endorsed:) Filed June 8, 1904, M. T. Simonton, Clerk.

30 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Case.

Before Gear, J.

To E. C. Peters, Esq., Deputy Attorney General.

SIR: Take notice, that I have this day filed in the first Circuit Court the defendants' bill of exceptions in the above entitled cause.

June 8, 1904.

ALFRED S. HARTWELL,
Attorney for Defendants.

Copy of foregoing notice and of said Bill of Exceptions received this 8th day of June, 1904.

E. C. PETERS,
Deputy Att'y General,
By M. F. PROSSER.

(Endorsed:) Filed June 8, 1904. M. T. Simonton Clerk.

31 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Case.

Before Gear, J.

Defendants' Motion for Extension of time for Filing Further Bill of Exceptions.

Defendants move that their time be extended for filing further bill of exceptions, specifying all exceptions taken and allowed in said cause as shown by the transcript of the record until ten days from date of filing said transcript.

COTTON BROTHERS & COMPANY,
By Their Attorney, ALFRED S. HARTWELL.

Dated June 9, 1904.

(Endorsed:) Filed June 9th, 1904. Wm. R. Sims, Clerk.

Service of a copy of the within proposed motion this day admitted.
E. C. PETERS,
Deputy Att'y Gen., for Pl'ff.

June 9–1904.

32 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Law. September Term, 1903.

TERRITORY OF HAWAII, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Case.

Before Gear, J.

Order Extending Time for Filing Bill of Exceptions.

Upon defendants' motion herein filed it is ordered that defendants have ten days from dated of filing transcript of record herein to file a further bill of exceptions taken and allowed in said cause, as shown by the said transcript.

(Sgd.) GEO. D. GEAR,
Second Judge, First Circuit Court, Territory of Hawaii.

Dated June 9, 1904.

(Endorsed:) Filed June 9" 1904, Wm. R. Sims, Clerk.

Service of a copy of the within proposed order this day admitted June 9" 1904.

(Sgd.) E. C. PETERS,
Deputy Att'y General, Att'y for Pl'ff.

33 In the Circuit Court of the First Circuit of the Territory of Hawaii, April Term, 1904.

TERRITORY OF HAWAII, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Case.

Before Gear, J.

Stipulation.

The said parties hereby stipulate that the defendants' motion for new trial may, by consent of the presiding Judge, be argued, and decided in vacation as of term time, and that exceptions to the

ruling thereon may be taken and allowed as of the April, 1904, Term of Court.

TERRITORY OF HAWAII,
(Sgd.) By E. C. PETERS,
Deputy Att'y Gen.

Without prejudice to all rights of the Territory of Hawaii.

COTTON BROTHERS & COMPANY,
(Sgd.) By Their Attorneys, KINNEY, McCLANAHAN & COOPER.

Dated June 24, 1904.

Consented to.
(Sgd.) GEO. D. GEAR,
Second Judge of First Circuit Court.

(Endorsed:) Filed June 23, 1904, Wm. R. Sims, Clerk.

34 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, April Term, 1904.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiffs,
vs.
COTTON BROS. & COMPANY, Defendants.

Action for Damages.

Stipulation.

It is hereby stipulated and agreed by and between the parties in the above cause that the defendants herein may have 10 days from and after the decision of the Court on defendants' motion for a new trial, within which to file their bill of exceptions herein.

E. C. PETERS,
Dep'ty Att'y Gen., Without Prejudice to Any and All Rights of the Territory of Hawaii, Attorneys for Plaintiff.
KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

The foregoing stipulation is hereby approved and defendants are hereby allowed 10 days from and after the Court's decision on defendants' motion for a new trial within which to file their bill of exceptions herein.

GEO. D. GEAR,
Second Judge of the Circuit Court of the First Circuit.

35 (Endorsed:) Filed July 18th, 1904—10:3[9]* A. M. Wm. R. Sims, Clerk. Copy. [Received July 15, 1904. E. C. Peters.]†

36 San. Francisco, Cal., to Sims, Honolulu.

2—27—1905. 11 A. M.

In Territory *versus* Cotton order motion for new trial granted. Grounds mailed.

GEAR, *Judge.*

37 Envelope endorsed in pencil. Territory *v.* Cotton *et al.* Law [In handwriting of Henry Smith, Clerk]* (In the handwriting of Judge Gear, in ink), Wm. R. Sims, Esq., Clerk Circuit Court, Honolulu, T. H. Postmark, San Francisco, Cal., Feb. 25, 12 M. 1905.

[Postmark back of envelope "Honolulu, H. Isles, M'ch 3—8 P. M. 1905 Recd.]*

[Wm.]*

3 other envelopes addressed William R. Sims, Esq., Clerk Circuit Court, Honolulu, T. H., all bearing postmarks San Francisco, Cal., Feb. 25, 12 M. 1905.

[All bearing Postmark on back of same, Honolulu, H. Isles, M'ch 3, 8 P. M. 1905 Recd.]*

38 Law Office of H. L. Gear, 310 Pine Street, Room 6 & 7.

SAN FRANCISCO, CAL., *Feb. 25th,* 1905.

W. R. Sims, Esq., Honolulu.

MY DEAR SIMS: Sickness has kept me in San Francisco, when I would like to have been home but could not get there. I send herewith 2 memoranda for you to file. I hope they will get there in time. Please file them immediately. With aloha,

Yours, etc.,

(S'g'd) GEO. D. GEAR.

(Endorsed:) Circuit Court of the First Circuit. Letter from Hon. Geo. D. Gear, 2nd Judge above Court, to Wm. R. Sims, Clerk of said Court, dated Feb. 25, 1905. *Re* Cotton Bros. & Co. *adv.* Territory of Hawaii, and E. R. P. Holt *vs.* A. Christian, received March 4, 1905. Filed March 4, 1905, 10 o'clock A. M. Wm. R. Sims.

[*Words and figures enclosed in brackets inserted in pencil by clerk, W. R. S.]
[†Words and figures enclosed in brackets erased in pencil by clerk, W. R. S.]

39 In the Circuit Court of the First Circuit, Territory of Hawaii.
At Law.

TERRITORY OF HAWAII, ETC.,
vs.
E. J. COTTON ET AL., Defendants.

This was an action brought by the Territory against the defendants for damages for negligence whereby the Government dredger was wrecked and lost while in the care of the defendants.

The case was tried before a jury, which returned a verdict in favor of the plaintiff and against the defendants for the sum of Twenty-five Thousand ($25,000.00) Dollars. The defendants in due time made and perfected their motion for a new trial which was argued and submitted.

There are two main questions raised in the brief and argument of the defendants, one of them being that there is no showing of negligence upon which a verdict in favor of the plaintiff can stand, and the other being that there was no definite evidence of the value of the lost dredge upon which to base the verdict rendered by the jury.

In a consideration of the case it is apparent that the main facts are undisputed. In other words the facts of the case are so clearly preponderant that the question of negligence becomes one of law for the court to decide.

Under the facts in this case the question is as to whether the jury were authorized in finding a verdict for the plaintiff, or whether they should have been instructed to find for the defend-
40 ants.

"There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law. Union Pacific Railway Company *v.* McDonald, 152 U. S. 262, 283. The rule is thus announced in that case: 'Upon the question of negligence * * * the Court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Delaware, Lackawana &c. Railroad *v.* Converse, 139 U. S., 469, 472 and authorities there cited; Elliott *vs.* Chicago, Milwaukee & St. Paul Railway, 150 U. S. 245; Anderson County Commissioners *v.* Beal, 113 U. S. 227, 241."

Southern Pacific Company *v.* Pool, 160 U. S., 440-441.

Before considering the evidence in the case, however, it would be well to take up the question of the value of the dredger for the purpose of determining whether or not the evidence of value was sufficient to support the verdict in this case.

Defendants contend that there is no evidence in the case of the value of the dredge at the time and place she was lost, and that, under the instruction of the Court that the amount the plaintiff could recover, if at all, was the value of the dredge at the time of the loss, the verdict was not supported by the evidence.

41 There was evidence in the case of what the dredge cost, what she was worth six months prior to the time she was lost, and that a new machine of equal value and of equal capacity could be built for $25,000, but no direct evidence as to her value at the time she was lost. Defendants say

"It is well settled, of course, that the value of the dredge must be estimated as of the time and at the place when the owner was deprived of the property."

Citing Hale on Damages, p. 185.

The rule that the value of the property destroyed must be estimated "as of the time and at the place where the owner was deprived of the property" may be conceded, but nevertheless this does not require that the evidence should be restricted — direct evidence of the exact market value of the property at such time and place.

The rule is well stated in the following case:

"The law as to what is the measure of damages in the abstract, in cases where the property of one has been destroyed unintentionally, but by the negligence or carelessness of another, when there is no element of willfulness or maliciousness in the destruction, is well settled to be just compensation in money for the property destroyed; such an amount as will fully restore the loser to the same property status that he occupied before the destruction. To arrive at the amount of such compensation, inquiry in the absence of malice, is necessarily confined strictly to the ascertainment of the value of the property destroyed, with such incidents of interest for the retention of such value from the person entitled thereto as may be sanctioned by law. The contention * * * that the plaintiff, in establishing the value of his destroyed properties, should have been confined to proof of its market value at the time and place of its destruction; and that the admission of evidence as to the original cost of

42 the properties, and as to the depreciation thereof from its original cost by usage or otherwise, was erroneous, * * *

"Wherever there is a well-known or fixed marked price for any property, the value of which is in controversy it is proper, in establishing the value, to prove such market value; but in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor—an ability from such demand, to sell the same when a sale thereof is desired. Where therefor there is no demand for a thing—no ability to sell the same—then it cannot be said to have a market value 'at a time when and a place where' there is no market for the same. We think it would have been a very harsh rule in a case like this to leave the plaintiff to the proof of the market value of the property at the time and place of its destruction, in the absence of proof that at the time and place of such destruction there was a market for such property. In cases where property is of a well-known kind in general

use, having a recognized standard value, it is not proper to circumscribe the proof of such value within the limits of the market demand at the time when, and at the place where, it was destroyed. Were the rule contended for to prevail, then the compensation for personal properties, confessedly, worth thousands of dollars, would be reduced to a pittance in cents if destroyed en route from market to market, in a thinly settled, barren country where there is no demand, simply because the accident of "time and place" of its destruction etc."

Jacksonville etc. Co. *vs.* Peninsular etc. Co. 27 Fla. 1-157. 9 So. Rep. 661, 17 L. R. A. 33, 65.

It seems to me that the evidence as to the value of the dredger was sufficient to support the verdict and that it should not be set
43 aside on the ground that it is not supported by sufficient evidence of the value of the dredge at the time of its loss.

The next question raised by the defendants is as to whether there is legal evidence of negligence upon the part of the defendants which would make them responsible for the loss of the dredger. This phase of the case will now be considered.

Mr. Boyd testified that after the execution of the contract with the defendants there was "a request on the part of the defendants in this case to remove the dredger from the harbor of Honolulu to a place elsewhere, to wit, the channel leading to and connecting with the entrance of the harbor of Pearl Harbor"; that this request was made by Mr. Agassiz about six or seven months after the execution of the contract; "Mr. Cotton (evidently meaning Mr. Agassiz) called on me and stated that there was a possibility of their taking over the contract for the dredging of Pearl Harbor from the contractors, and wanted to know if there was any objection to their taking the dredger down there, and called my attention to the contract that there was a term of the contract expired (unexpired) which would expire on the 10th day of January, 1903. To the best of my recollection I said to Mr. Agassiz that as they hadn't completed their negotiations with Henley and Company for the dredging of Pearl Harbor I was unable to come to any understanding with them at the time until a more definite arrangement was made between them and Mr. Henley. He asked me if I had any objection to the dredger being taken down there. I said I had no objection provided a proper safeguard was made for protecting the government's property." (Trans. pp. 7, 8) The matter of rental was talked of "what the government would charge for the use of the dredger down there was talked of." (*Id.*)

"The reason rental was talked of at the time, I proposed the
44 rental to them as it was being taken out of the Harbor of Honolulu, taken down to work in Pearl Harbor, on which they called my attention to the contract, they had an unexpired term between three and four months, and under that contract on an unexpired term they had a right to the use of the dredger, so in the conversation that if they gave a guarantee of the return of the dredger, just as in the former contract that the permission may be given by the government to them to take the dredger down there,

and after the expiration of their term they were to pay a rental I think it was $1000 per month.

"Q. Can you state whether or not this guarantee of which you speak was ever furnished?

"A. I left for the Coast before there was any final agreement entered into.

"Q. What did Mr. Agassiz say during these negotiations?

"A. Well, what he stated was calling my attention to that term of the contract and the rental of the dredger after the expiration of the contract. I was agreeable to it, and also upon being,—the contract being transferred to the Cotton Brothers that the final agreement would be entered into with the Government in order to protect the government's property, that is, protect the dredger.

"Q. Protect the government's property where?

"A. On its being taken out of the harbor to Pearl Harbor.

* * * * * * *

"Q. Go ahead, what else did Mr. Agassiz say?

"A. That was agreed upon by Mr. Agassiz and myself, that the final arrangement of taking the boat from the harbor was to be completed after they had their contract, that is transferred the contract from Henry and Company—whoever they were—over to Cotton Brothers.

"Q. What else was said by Mr. Agassiz, if you recollect?

45 "A. I don't remember of any conversation further on the matter, because before they completed arrangements with the former contractors on Pearl Harbor I went away.

"Q. Can you state whether or not permission was ever granted by you for them to take the dredger to Pearl Harbor?

"A. Not to my recollection."

(Ex. pp. 7-10.)

On cross examination Mr. Boyd testified:

"Q. You said Mr. Boyd that Mr. Agassiz was agreeable to arrange with you,—it was suggested about paying additional rental after his time was up?

"A. Yes sir.

"Q. And in that event you were agreeable to its going down there?

"A. Provided—as agreeable to its going down there on their paying a $1000 a month rental, provided an agreement would be entered into between Cotton Brothers and the government in regard to the protection of the dredger.

"Q. Was there anything said in particular about anything to be done for the protection of the dredger; that is a further guarantee? I mean for the protection of the dredge, to do anything to the dredge itself?

"A. From their (further) bond.

"Q. You mean papers then?

"A. Yes, further bond.

"Q. The agreement to return it at the end of the additional time, bonds and all that?

"A. The agreement entered into for the additional term, that is for taking the dredger out of the harbor.

"Q. Yes I have the idea correctly I think. There was nothing more to be done to the dredger itself, but merely *merely* mention it, papers you had in mind?

46 "A. For the taking of the dredger out of the harbor?

"Q. Nothing more was to be done to the dredger, but merely that the additional papers, bonds, etc., were to be signed?"

Not answered.

Mr. Agassiz, for defendant, testified that defendants first considered the Pearl Harbor contract about July, 1902; That when defendants took the contract for dredging Pearl Harbor off the hands of Clark and Henry the latter had taken out 23,000 yards all told and their time had run three months, whereas they had agreed to take out 20,000 yards a month; that in regard to using the Government dredger at Pearl Harbor, he went to the Board of Public Works office and told Mr. Boyd that I was making arrangements to go down there and take the contract off Clark and Henry's hands, "and to put the work through I would need the Government dredger." He asked me about when the present contract expired, I told him it expired I thought on the 10th of January, 1903, and then asked him what arrangements we could make for the continuance of our contract on the dredger after that time expired;" that "he said that the contract price would not exceed $1,000 per month. I then said I was then making arrangements with Clark and Henry to do this work and I would probably want to take the dredger down as soon as the contract was made," referring to the contract with Clark and Henry, and he said that "he was going away, I think immediately almost, and when he returned from the coast that we'd make another contract." "After all that was said Mr. Boyd said that it was all right, that when he returned we'd make arrangements for the continuance of the contract and the terms were not to exceed $1,000 per month for the rental." "My recollection is that he did give me permission to take the dredger to Pearl Harbor." "When I left Mr. Boyd he said *he said* it is all right, go ahead, that is the thing

47 he said." That then Mr. Agassiz communicated with his partners, took the contract off the hands of Clark and Henry, and took the dredge to Pearl Harbor on the 30th of October, following (pp. 183-5, Ex.)

On cross examination witness stated that he told Marston Campbell he was going to take the dredger to Pearl Harbor. "I told him when Mr. Boyd had gone, I went out to his house to see him, when he was laid up with his broken leg; I told him we were about ready to take the dredger to Pearl Harbor."

"Q. Supposing Marston Campbell should state that you never asked him or told him that you were going to take the dredger to Pearl Harbor, and Mr. Campbell says that he would never have let you take it to Pearl Harbor if he had been on his feet, what would you say to such a question?

"A. Do I understand you to say that Mr. Campbell said that he didn't know I was going to take that dredger to Pearl Harbor?

"Q. And that he wouldn't have let you take it to Pearl Harbor if he had been on his feet?

"A. Mr. Campbell was laid up with a broken leg at that time but I think that Mr. Campbell recollect- that I did tell him so, I don't think there is any question about that; I don't think he will say that I didn't tell him."

* * * * * * *

"Q. What was the occasion of your telling Mr. Campbell that you were going to take the dredger to Pearl Harbor?

"A. I didn't go to tell Mr. Campbell I was going to take the dredger to Pearl Harbor; I went out to see him and casually stated we are nearly ready to take the dredger to Pearl Harbor, and had been for two or three weeks, and we had received no word from Campbell (not) to do so, so I don't think Mr. Campbell would say that he didn't know. I wouldn't be certain how long he was laid up.

48 "Q. Did Mr. Campbell say anything as to the safety or importunacy (?) of taking the boat to Pearl Harbor.

"A. No sir, nothing."

(Ex. pp. 228-9.)

Mr. Agassiz further testified on cross-examination:

"Q. Why did you go to Mr. Boyd to get permission to go to Pearl Harbor?

"A. I went to find out whether our contract would be extended after our time expired, because I didn't think our contract ran long enough to allow us to complete the job.

"Q. If that was what you went to see Mr. Boyd about, why should it be the last thing Mr. Boyd said, 'that is all right, go ahead, take her to Pearl Harbor?'

"A. I suppose he meant he was willing to let the dredger do the work.

"Q. After the expiration of the contract?

"A. No, I inferred that he meant he was willing for me to take the dredger to Pearl Harbor when my contract with Clark and Henry was signed. I told Mr. Boyd Clark was here at the time and we were going to arrange to do the work.

"Q. If you went for a continuance of the contract, how is it you never decided the continuation of the contract, but decided the Pearl Harbor proposition?

"A. Because Mr. Boyd said we had to make arrangements for a continuance of the contract after he came from the Coast. I think he was going away the next day.

"Q. Does your recollection serve you absolutely correct as to this conversation with Mr. Boyd?

"A. I think it is as near as anyone's recollection could serve them.

"Q. Is it not a fact that the Pearl Harbor proposition was
49 just mentioned and nothing definite done as in relation to the continuation of the contract?

"A. No sir, I went there to see Mr. Boyd, and the two men I was dealing with were waiting at the office until I returned before I would give consent to do anything with their job until I got permission to use the dredger on Pearl Harbor." Trans. pp. 229, 230.)

Mr. Boyd was not called to rebut the evidence of Mr. Agassiz, nor was any testimony introduced by the plaintiff to contradict the statement of Mr. Agassiz as to what he told Mr. Campbell or as to Mr. Campbell's knowledge of the intention of Mr. Agassiz to take the dredger to Pearl Harbor.

There is not one iota of evidence to show that any objection was ever made to the use of the dredger at Pearl Harbor, or that it was not proper to use it there. Mr. Boyd's testimony shows conclusively that even if he did not remember of giving permission to take it to Pearl Harbor, he promised at least that it would be allowed to be used there after Agassiz had taken over the contract from Clark and Henry, and that there was only a "final agreement" to be entered into. There was certainly a preliminary agreement that the rental would be $1000 a month after the expiration of the first contract, which still had several months to run. This first contract bound defendants to expend $10,000 on the dredger for its use for 12 months, nearly $1,000 a month, and to give a bond for $10,000 for its return and insure it against fire for $20,000. Of course after the expiration of the contract the defendants would need to execute another agreement for at that time there was no agreement for a monthly rental, and a new bond would be necessary. There is no other evidence in the record on the question of taking this dredge to Pearl Harbor, and I can find nothing in the evi-
50 dence which can be construed in any way to show negligence by the defendants in taking the dredger to Pearl Harbor. The plaintiff cannot now say that because the dredger was lost the defendants are liable merely because they took it to Pearl Harbor. The plaintiff not only did not object to its being taken there, but on its own showing agreed to it and promised to make a final agreement to that effect after Mr. Agassiz had taken over Clark and Henry's contract. According to the undisputed evidence of Mr. Agassiz when he went to ask for the dredger he had not taken over the contract, and wanted to be sure he could have the use of the dredger for the work at Pearl Harbor before he would take the contract. He says when he went to see Boyd, "the two men I was dealing with were waiting at the office until I returned before I would give consent to do anything with their job, until I got permission to use the dredger on Pearl Harbor." (Ex. p. 230.)

By no conceivable construction of the evidence can it be said that the Territory can complain of alleged negligence of defendants in taking this dredger to Pearl Harbor. If the Territory permitted it through its officers or even agreed to permit it provided the defendants signed certain papers and bonds, it does not lie in plain-

tiff's mouth to say that using the dredger at Pearl Harbor was in itself negligence, or in other words, such an act as a reasonably prudent man would not do. I do not see how it can be contended for one moment that the defendants should be charged with negligence in doing what the Territory permitted or agreed to permit them to do. The mere use of the dredger there was certainly in the mind of Boyd when he agreed that Agassiz could have it for $1000 per month. If this is not so, for what was he to charge the $1000 per month? The evidence is plain that it was for the use of the Government dredger in dredging Pearl Harbor. Now would it be any more negligent on the part of the defendants to dredge Pearl
51 Harbor with this dredge after the *final* agreement was signed than it would be before? It seems to me that there can be but one answer to this question. If the action of the defendants in using the dredger at Pearl Harbor was negligence it would be because they did what a prudent man would not do under the same circumstances, yet the action of plaintiff in agreeing to such use then or thereafter estops plaintiff from claiming that such an act was negligence.

It must be borne in mind that this is an action for damages for negligence, and not for breach of contract brought on the theory that the dredger was hired to be used in Honolulu only, but used in Pearl Harbor without an agreement therefor.

As the Court instructed the jury, the contract being silent as to where the dredger was to be used, the use of it for dredging Pearl Harbor might be presumed to have been contemplated by both parties, and the defendants were not chargeable with negligence merely because they used the dredger at that place, "whether the plaintiff expressly agreed that it might be used there or not." This instruction whether right or wrong became the law of the case, and therefore the jury was not warranted in finding negligence from the mere fact that it was used there. It follows therefore that the fact that this dredger was taken and used at Pearl Harbor did not of itself constitute negligence, and would not support the verdict.

The next contention might be that the negligence consisted of improperly mooring the dredger, but of this there is no evidence, but on the contrary the evidence shows that she was properly moored. In fact McCauley, a witness for the plaintiff, on cross examination testified that "she was moored all right as I understand it." (Ex. p. 83.) The verdict cannot be upheld on the ground, therefore, that the dredger was improperly moored for there is no evidence to that effect.

The next contention which would logically be advanced
52 would be that the dredger was moored in an improper place, where an ordinarily prudent man would not moor her, but this is obnoxious to the above criticism for there is no evidence to uphold such a contention. On this point the Court instructed the jury that,

"If you find from a preponderance of the evidence that the placing of the scow upon the bar of the channel leading to the mouth of Pearl Harbor was not such an act as an ordinarily careful and

prudent man would exercise as to his own property under similar circumstances, then I charge you, gentlemen of the jury, that the defendants were guilty of negligence in placing the dredger in that position." (Ins. 12 for plaintiff.)

I fail to find any evidence that the placing of the dredger in the position she was placed in at the time she was taken to Pearl Harbor was "not such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances." The evidence on behalf of plaintiff is that the dredger was moored in the middle of the channel in about 14 or 15 feet of water; that the dredger was drawing about 7 feet of water and she lay on the bar between the shore and the edge of the reef, about two miles from land and about three quarters of the length of the channel which was afterwards dredged, toward the land. (See Ev. pp. -8-61, and Exhibit "D" of Plaintiff) The defendants moored their own dredger further out towards the sea, and moored the other dredger in the same place the lost dredger had been moored.

Plaintiff says that the case could be rested alone upon the evidence of Captain McCauley to the effect that the dredger "was not a sea-going dredger and that its mooring at that place, although that mooring in itself were safe, was not the act of a careful and prudent man." Plaintiff put a hypothetical question to Captain McCauley and after stating facts assumed to be true, asked him if with
53 his experience he would say "it would be safe or prudent for a dredger such as I have described, to be moored in such a place under such circumstances?" to which question the Captain answered "Decidedly not." (Ev. pp. 80, 81.)

A similar hypothetical question was asked Captain Sorensen, who answered "no, I should think not." (Ev. pp. 86-88.)

In determining whether or not these answers are sufficient upon which to base a verdict that the act was not "such as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances," it is necessary to refer to the hypothetical question. Let it be noticed in the first place that the question, after stating the hypothetical case, is—"Would you say it would be safe or prudent for a dredger such as I have described to be moored in such a place under such conditions"? That is, would it be safe or prudent to moor a dredger of the dimension mentioned in the hypothetical case; built as she was described; with a heavy southerly swell running for five days prior to Sunday; each day the water getting rougher and the swell worse, the waves running twelve feet high in fourteen feet of water; the highest southerly swell but two a certain yachtsman had ever seen, and he had visited the harbor fully a hundred times; a scow of about the same size as used for the dredger having parted her mooring and gone on the reef during the same rough weather; the moorings of the dredger being specifically described; and "on the morning of November 18th, at about three o'clock this dredger dragged and parted her weather moorings and sank upon the reef bordering the channel 300 to 400 yards to the northerly of where she was moored, and to the leeward of the channel leading to the harbor; she had parted her wire cable leading to

the northeast and the south-southeast." That was the case stated, and the question asked on it was as to whether it "would be
54 safe or prudent for a dredger such as I have described to be moored in such a place under such conditions."

* * * * * * *

What an answer to predicate negligence upon! If the dredger broke her moorings and sank was it "safe or prudent" to have her "moored in such a place under such conditions"? The question might as well have been as follows: "With your experience, captain, the dredger having parted her moorings in the storm, and having sank and been lost, was she safely and prudently moored?" or "having sank was she safe?" Only a fool or a knave could answer such a question in the negative. Although the question was allowed to be asked and answered without objection by defendants, it is little to be wondered at that the very next question asked of Captain Sorenzen was the question asked on cross examination. "Captain, you infer now that it was not safe in consequence of the dredger having sunk; does not that affect your judgment?" to which the captain answered "Yes, to a certain extent, it necessarily would do so I take it in most any man." (Ev. p. 88).

Captain Macauley was asked on cross examination after answering the hypothetical question the following question, viz: "You don't think it was a prudent thing to moor her where she was moored?" to which he answered "In fine weather, yes, but very imprudent to keep her there in bad weather."

"Q. No matter what kind of moorings?

"A. The better the moorings the longer she stayed there; she was moored all right as I understand it." * * *

"Q. It would not make any difference about the moorings?

"A. Not a bit; moorings would hold her there."

(Ev. p. 83.)

He was asked on direct examination "What would be the proper course to pursue upon the springing up of the southerly
55 weather?" to which he answered "bring her into a safe harbor.

"Q. Was there a safe harbor near there?

"A. Yes sir.

"Q. What harbor is that?

"A. Pearl Harbor." (Ev. p. 81.)

It will readily be seen, I think, that evidence such as that quoted of the two Captains is absolutely insufficient to show that the mooring of this dredger where she was moored under the circumstances of this case, was not "such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances." The question seems to fight shy of all the essential ingredients going to make up the definition of negligence. The question was not as to whether an ordinarily careful and prudent man would have moored her there at the time she was moored, for such a question would have been answered in the affirmative. Macauley says it *was* "a prudent thing to moor her where she was moored, in fine weather." (Ev. p. 83.) As she *was* moored there in

fine weather according to plaintiff's own case, the mooring was not an act of negligence or want of ordinary care. In fact plaintiff's own witness, Macauley, states "She was moored all right as I understand it." (Ev. p. 83.) If she was moored "all right" she was not moored negligently or with a want of ordinary care.

Negligence is a failure to do what an ordinarily prudent person would have done under the same circumstances or the doing of what such a person under the same circumstances would not have done.

Thomp. Com. on Neg. Sees. 23, 24.
Cent. Dig. tit. "Negligence." Col. 332.
Northwest Transp. Co. *v.* Ins. Co. 41 Fed. Rep. 799, 801.
Nitro-Glycerine Case, 15 Wall. 524.

56 The evidence in this case fails to show any failure on the part of the defendants to do what an ordinarily prudent person would have done under the same circumstances, or the doing of what such a person would not have done. It seems to me that the Court erred in failing and refusing to instruct the jury to return a verdict for the defendants, and for this reason a new trial should be ordered.

(S'g'd) GEAR, *Judge.*

(Endorsed:) In the Circuit Court First Circuit Territory of Hawaii. At Law. Territory of Hawaii. *v.* E. J. Cotton, *et al.* Filed March 4th 1905 10 o'clock A. M. Wm. R. Sims, Clerk.

57 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiff,
v.
COTTON BROS. & COMPANY, Defendants.

Damages.

Motion.

Now come the defendants herein, by their attorneys, Kinney, McClanahan & Cooper, and move this Honorable Court that a formal order be entered granting the defendants a new trial in the above entitled cause.

This motion is based on the record including the decision of the Honorable George D. Gear, formerly Second Judge of the Circuit Court of the First Circuit on defendants' motion for a new trial.

COTTON BROS. & COMPANY,
(S'g'd) By KINNEY, McCLANAHAN & COOPER, *Their Attorneys.*

Notice of Motion.

To Lorrin Andrews, Attorney General:

Please take notice that we shall present the foregoing motion to the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Circuit, on Saturday, the 22nd day of April at 9:30 a. m. or as soon thereafter as counsel may be heard and ask that the same be allowed.

(S'g'd) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

(Endorsed:) Motion & Notice. Hon. A. Lindsay, Jr., Judge. New Trial Granted on reverse side of this. Filed April 14th, 1905, at 1:13 P. M. Wm. R. Sims, Clerk.

The Court, this 17th day of July, 1905, Grants Motion and directs formal order be entered Granting defendants a New Trial in this cause.

(S'g'd) —— SIMS, *Clerk.*

58 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Supt. of Public Works, Plaintiff,
v.
COTTON BROS. & COMPANY, Defendants.

Damages.

Order Granting Defendants' Motion for a New Trial.

The above named defendant, Cotton Bros. & Company, by its attorneys Kinney, McClanahan & Cooper, having moved that an order be entered granting the defendant a new trial of the above entitled action, and the court having duly considered said motion and the grounds and the arguments presented by the respective parties, and being fully advised in the premises, said motion is granted; and,

It is therefore and hereby ordered that in the above entitled action a new trial be had.

Daied Honolulu, Territory of Hawaii, this 18th day of July, A. D. 1905.

(S'g'd) ALEXANDER LINDSAY, JR.,
Second Judge, Circuit Court, First Judicial Circuit.

(Endorsed:) Order Granting Def'ts' Motion for a New Trial. Alex. Lindsay, Jr., Judge. Filed July 18th, 1905, at 3.2[1]* P. M. (S'g'd) W. R. Sims, Clerk.

[*Figure enclosed in brackets inserted in pencil by clerk, W. R. S.]

59 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Supt. of Public Works, Plaintiff,
v.
COTTON BROS. & COMPANY, Defendants.

Damages.

Now comes the plaintiff in the above entitled action, by E. C. Peters, Deputy Attorney General, and excepts to the ruling heretofore, to wit, on the 18th day of July A. D. 1905, made by His Honor the Honorable Alexander Lindsay, Jr., granting the motion for the defendants in the above entitled action for a New Trial thereof.

E. C. PETERS,
Deputy Attorney General.

The foregoing exception is allowed.
ALEXANDER LINDSAY, JR.,
Second Judge of the Circuit Court,
First Judicial Circuit, Territory of Hawaii.

[order]* [a]*
(Endorsed:) Exception to ^ Granting [motion for]† New Trial [by Judge Lindsay.]† Filed July 19th, 1905, 10:40 A. M. W. R. Sims, Clerk.

60 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,
vs.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.
Action on the Case.

Plaintiff's Proposed Bill of Exceptions.

This is an action on the case instituted in the name of the Territory of Hawaii against the defendants for the sum of Twenty-five Thousand Dollars ($25,000.00), as damages, for the loss of a certain dredge, belonging to the Territory of Hawaii, and hired by defendants from the Territory.

[*Words enclosed in brackets inserted in pencil by clerk, W. R. S.]
[†Words enclosed in brackets erased in pencil by clerk, W.R. S.]

That heretofore, to wit, on the 23rd day of May, A. D. 1904, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at its April, 1904, Term, said cause coming on regularly for trial before a jury, the Honorable George D. Gear, the then Second Judge of the said Court presiding, and the defendants having admitted the execution of the contract as in the complaint in said cause alleged, the ownership of the dredge, its delivery by the Territory of Hawaii to the defendants, due demand made by the Territory of the defendants for the return of the dredge after the expiration of the said contract, and the refusal of the defendants so to do; and evidence having been adduced both by the plaintiff and the defendants, and the Court having instructed the jury upon the law of the case, the jury retired to consider its verdict, and thereafter,

61 to wit, on the 27th day of May, A. D. 1904, said jury rendered a verdict in Court in favor of plaintiff and against the defendants in the sum of Twenty-five Thousand Dollars ($25,000.00).

That at the time of the rendition of said verdict the defendants excepted to the verdict as contrary to the law and evidence, and gave notice of motion for a new trial.

First Exception.

That thereafter, to wit, on the 31st day of May, A. D. 1904, the defendants filed, with the Clerk of the Circuit Court of the First Judicial Circuit their motion for a new trial in said cause, stating grounds therefore as follows:

"(1) The defendants move the Court to make an order granting "a new trial of the above entitled cause on the ground that the "verdict of the jury in said cause was and is contrary to the law "and the evidence, and was duly excepted to by defendants as such, "and more particularly because there was no evidence tending to "show negligence or want of proper care of the defendants and "because the jury failed to deduct from the sum of $25,000.00 "which the plaintiff claimed as damages for failing to return the "property delivered to the defendants under the contract referred to "in its complaint, the sum of $10,800.00 shown by the undisputed "and admitted testimony to be the value of the portions of that "property returned by the defendants to the plaintiff.

"(2) And for errors of law occur-ing during the trial of which "exceptions were noted by the defendants and

"(3) For errors in the admission and rejection of testimony to "which exceptions were noted by the defendants

"(4) And for the refusal of the Court to give instructions re-"quested by the defendants and for giving certain instructions re-"quested by the plaintiff, to which exceptions were noted by the "defendants."

That thereafter, to wit, on the 7th day of June, A. D. 1905,

62 said motion for a new trial in said cause having come on to be heard before the Honorable George D. Gear, the then Second Judge as aforesaid, plaintiff objected to the hearing of said

motion for a new trial and moved that the same be dismissed on the ground that the said defendants had failed and neglected, within the time required by law, to file a sufficient bond of security, conditioned for the payment of all costs of motion in case they fail to sustain the same, and that they would not to the detriment of the plaintiff in said cause remove or otherwise dispose of any property they might have liable to execution upon the judgment in said cause. That thereupon the said objection of plaintiff to the hearing of said motion for a new trial, and its motion to dismiss the said motion, was overruled by the Court, to which ruling of the Court the said plaintiff then and there duly excepted.

Second Exception.

That thereafter, to wit, on the 7th day of June, A. D. 1904, Wm. R. Sims, Esq., Clerk of the said First Circuit Court, and particularly acting as Clerk for the Honorable George D. Gear, Second Judge as aforesaid, entered the following judgment in said cause:

"This action by petition claiming $25,000.00 damages came to "the August, 1903, Term and thence by continuance to the Present "Term, when the parties appeared and were at issue to the Jury.

"Said cause having been heard and committed to the jury they "find for the plaintiff to recover $25,000.00 damages.

"Therefore it is adjudged that the plaintiff recover of the defend- "ant $25,000.00 damages and his costs taxed at $20.00 Twenty Dol- "lars.

"Entered this 7th day of June, 1904, as of April Term, 1904.

"By the Court,

"WM. R. SIMS, *Clerk.*"

63 And that thereafter, to wit, on the said 7th day of June, A. D. 1904, the said defendants did file with the Clerk of said Court their motion for a new trial, bearing like date, stating grounds as follows:

"Judgment being this day entered against the defendants on the "verdict herein rendered against them on May 26th, last, the de- "fendants now give notice of their motion herein filed for a new "trial, on the grounds therein named."

That thereafter, to wit, on the 7th day of June, A. D. 1904, defendants moved for and were granted twenty-four hours from and after said date within which to perfect their motion for a new trial by filing a bond as required by statute; and within said granted time filed a bond, which appears on file herein.

That on the 8th day of June, A. D. 1904, Henry Smith Esq. Clerk of the Judiciary Department of the Territory of Hawaii, entered in said cause the following judgment, quoted with the omission of title of court and cause:

Judgment May 27th, 1904.

"This action by petition claiming Twenty-five Thousand Dol-
" lars damages came to the present term of this Court when the
" parties appeared and were at issue to the Jury.

"Said cause having been heard and committed to the jury they
" found for the plaintiff to recover from the defendants the sum of
" Twenty-five Thousand Dollars damages.

"Therefore it is adjudged that the plaintiff herein have and re-
" cover of the defendants the sum of Twenty-five Thousand Dol-
" lars damages and costs taxed at Twenty (20) Dollars.

"Entered this 8th day of June, 1904, as of the 27th day of May,
" 1904.

" By the Court,

" HENRY SMITH, *Clerk.*"

That thereafter, to wit, on the 24th day of June, A. D. 1904, the parties to said cause, by their respective counsels and attorneys, entered into the following stipulation, which was consented
64 to by the said judge.

"The said parties hereby stipulate that the defendants'
" motion for a new trial, by consent of the presiding Judge, be
" argued and decided in vacation as of term time, and that excep-
" tions to the ruling thereon may be taken and allowed as of the
" April, 1904, Term of Court."

That thereafter, to wit, on the 26th day of August, A. D. 1904, hearing upon said defendants' motion for a new trial having been postponed from time to time, the said motion was over protest of plaintiff, presented to the said Honorable George D. Gear, Second Judge as aforesaid, and argument had thereon by the respective parties to said cause, and said Judge took the said motion for a new trial under advisement, and did not upon said last named date decide said motion.

That thereafter, to wit, on the 27th day of February, A. D. 1905, the said Honorable George D. Gear was in the City and County of San Francisco, State of California, and on said last named date there was filed in said cause by Wm. R. Sims Esq., Clerk as aforesaid, a cablegram, purporting to be a decision of the said Judge, granting defendants' said motion for a new trial.

That thereafter, to wit, on the — day of February, A. D. 1905, the said Honorable George D. Gear, Judge as aforesaid while in the City and County of San Francisco, State of California wrote a decision purporting to grant the said defendant's motion for a new trial, and transmitted the said decision to the said Wm. R. Sims, as such clerk as aforesaid, and the said Sims did file the said decision on the 4th day of March, A. D. 1905. That at the time of the filing of the said decision by said clerk as aforesaid, the said George D. Gear had ceased to be Judge of the Circuit Court of the First Judicial Circuit, of the Territory of Hawaii.

That thereafter, to wit, on the 22nd day of April, A. D.
65 1905, the said defendants did present to the Honorable Alexander Lindsay, Second Judge of the Circuit Court of the First Judicial Circuit, their written motion wherein and whereby they did pray that a formal order be entered by said Judge granting the defendants a new trial in said cause, which said motion, thereafter, to wit, on the 17th day of July, A. D. 1905, was granted, and defendants were granted a new trial in said cause, to which ruling of the Court plaintiff duly excepted and said exception of plaintiff was duly allowed by said Judge.

That pleadings, record, clerk's minutes, official stenographers' notes, transcript of the evidence, and all papers, documents and exhibits on file in the above entitled cause, are hereby referred to and made a part of this proposed bill of exceptions.

And this plaintiff prays that said proposed bill of exceptions being found conformable to the truth, be approved.

Dated this 5th day of August, A. D. 1905.

TERRITORY OF HAWAII,
By C. S. HOLLOWAY,
Superintendent of Public Works of the Territory of Hawaii.
By E. C. PETERS,
Deputy Attorney General.

The foregoing Bill of Exceptions being found conformable to the truth is hereby allowed.

Dated, this — day of August, A. D. 1905.

——— ———,
Second Judge Circuit Court, First Judicial Circuit, Territory of Hawaii.

(Endorsed:) Proposed Bill of Exceptions. Filed and presented at 4:45 p. m. for allowance of Court August 5, 1905. Henry Smith, Clerk Jud. Dept.

66 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Action on the Case.

Defendants' Exceptions and Objections to Plaintiff's Proposed Bill of Exceptions.

1.

Defendants except and object to the following allegations on the first and second page- of plaintiff's proposed bill of exceptions, to wit:

"* * * and the defendants having admitted the execution of the contract as in the complaint in said cause alleged, the ownership of the dredge, its delivery by the Territory of Hawaii to the defendants, due demand made by the Territory of the defendants for the return of the dredge after the expiration of the said contract, and the refusal of the defendants so to do."

Defendants in this connection alleging that said statement does not correctly state the facts, and that the exact language of the admissions by defendants should be set forth.

2.

Defendants except and object to the allowance of any part of the proposed bill of exceptions or any bill of exceptions on the ground that the allowance of a new trial by either Judge Gear or Judge Lindsay is not a matter of review or of exception and cannot be taken up by exception, but that plaintiff is estopped so to do.

67

3.

Defendants except and object to the statement of defendants' motion for a new trial and contend that said motion verbatim should be set forth in said bill of exceptions, and claim that the statement as therein contained is prejudical to defendants.

[Waived not embodied in original.]*

Waived.

4.

Defendants except and object to all portions of said bill of exceptions charging failure on the part of defendants to properly perfect their motion for a new trial or connected therewith, on the ground that plaintiff has waived all such grounds of exception, and is not entitled to an exception on said ground, and on the further ground that the facts are incorrectly and prejudicially stated.

5.

Defendants except and object to the allegation in said bill of exceptions contained on the 5th page of said alleged bill of exceptions to the effect that defendants' motion for a new trial was over protest of plaintiff presented to the said Honorable George D. Gear, on the ground that said statement does not correctly set forth the facts relative to said motion or the objection of plaintiff thereto, and that the exact statement of plaintiff and defendants at the time relative to the hearing of said motion for a new trial should be set forth in said bill of exceptions.

6.

Defendants except and object to the allegations contained in said bill of exceptions to the effect that on the 27th day of February, 1905, there was filed in said cause by William R. Sims, Esq., Clerk as aforesaid, a cablegram purporting to be a decision of the said judge granting defendants' said motion for a new trial on the ground that such statement does not correctly state the facts.

[* Words enclosed in brackets inserted in pencil by clerk, W. R. S.]

68 7.

Defendants except and object to that portion of said bill of exceptions comprised in the last paragraph on the 5th page of said bill of exceptions, and the balance of said paragraph contained on the 6th page of said bill of exceptions, on the ground that the same is not conformable to the truth.

8.

Defendants except and object to the first paragraph on the 6th page of said bill of exceptions beginning as follows:

"That thereafter, to wit, on the 22nd day of April, A. D. 1905, * * *"

On the ground that the same is not conformable to the truth.

Wherefore and for divers other good and sufficient reasons defendants ask that plaintiff's said bill of exceptions be disallowed.

KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Hono., Aug. 8th, 1905.

(Endorsed:) Filed Aug. 8, 1905, at 3:05 P. M. George Lucas, Clerk.

69 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII
v.
COTTON BROTHERS ET AL.

Defendants' Objections to Plaintiff's Proposed Bill of Exceptions.

Objection 1. Is sustained, and the word "failure" should be substituted for the word "refusal."

Objection 2. Overruled.

Objection 3. Waived by defendants.

Objection 4. Sustained, for the record does not show that "plaintiffs objects to the hearing of said motion for a new trial and moved that the same be dismissed." (See clerk's minutes.)

Objection 5. Is sustained. The record does not show "over protest of plaintiff."

Objections 6 and 7. (1) Is overruled. The Minutes of the clerk show that Judge Gear was at San Francisco on February 27th, 1905.

(2) Is sustained. Nothing in record to show that Judge Gear wrote the decision in San Francisco.

(3) Is overruled.

(4) Is sustained.

Objection 8. Is sustained. Judge Lindsay did not "grant a new trial." Judge Gear granted the new trial and Judge Lindsay simply granted the motion to have such order for a new trial entered.

LINDSAY, *Judge.*

70 (Endorsed:) Decision [of Judge Lindsay]† on Ob- [and exceptions of Defendant to Plaintiff's]*
jections ^ [to]† Bill of Exceptions. Filed Dec. 19th, 1905, 11:30 a. m. Sims, Clerk.

71 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Motion that Bill of Exceptions be Settled and Signed.

Now comes the Territory of Hawaii, plaintiff above named, and moves the Court that the proposed Bill of Exceptions heretofore filed in the above entitled Court by the said plaintiff, be by the Court settled and signed.

This motion is based on all the papers, files and records in the above entitled cause.

Dated Honolulu, January 9th, A. D. 1906.

TERRITORY OF HAWAII,
By E. C. PETERS,
Attorney General of the Territory of Hawaii.
FRED. W. MILVERTON,
Deputy Attorney General of the Territory of Hawaii.

To Messrs. Kinney, McClanahan & Cooper, Attorneys for Cotton Brothers Co., defendants above named:

You will take notice that on Thursday, the 11th day of January, A. D. 1906, at 10 o'clock A. M., or as soon thereafter counsel
72 may be had, of said day, we shall move the Court that the foregoing motion be set for hearing.

E. C. PETERS,
Attorney General of the Territory of Hawaii.
FRED. W. MILVERTON,
Deputy Attorney General of the Territory of Hawaii.

(Endorsed:) Filed Jan. 9, 1906, at 3:40 P. M. George Lucas, Clerk.

[* Words enclosed in brackets inserted in pencil by clerk, W. R. S.]
[† Words enclosed in brackets erased in pencil by clerk, W. R. S.]

73 *Clerk's Minutes.*

April Term, A. D. 1904.

May 23rd, A. D. 1904.

TERRITORY OF HAWAII, by Superintendent of Public Works, HENRY E. COOPER, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Damages.

* * * The Court, on motion of Mr. Peters, orders Bill of Complaint amended by substitution of the name of C. S. Holloway in title of complaint in place of Henry E. Cooper, there being no objections.

[admits]*

* * * General Hartwell on behalf of defendants [demands]† truth of averments contained in paragraph- 1, 2, 3, 4, 5, of plaintiff's complaint.

74 *Clerk's Minutes.*

April Term, A. D. 1904.

[Tuesday, May 24, A. D. 1904.]*

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiff,
vs.
COTTON BROTHERS & COMPANY, Defendants.

Damages.

* * * Mr. Peters states defendant admits demand was made by Henry E. Cooper, Superintendent of Public Works of the Territory of Hawaii, upon Cotton Brothers & Company for return of dredge and that such demand has not been complied with. * * * Mr. Hartwell acquiesces.

[* Words and figures enclosed in brackets inserted in pencil by clerk, W. R. S.]
[† Words enclosed in brackets erased in pencil by clerk, W. R. S.]

75 April Term, A. D. 1904.

TUESDAY, *June 7th*, 1904.

W. R. S. At 9:45 A. M. Court convenes.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,
v.
COTTON BROTHERS & CO.

Damages.

Motion for a New Trial.

E. C. Peters, Deputy Attorney General, appearing for plaintiff.
Alfred S. Hartwell, Attorney for Defendant-.

Mr. Peters states that no bond has been filed, securing plaintiff from defendants' removal of property from this jurisdiction, as by statute provided, before granting a motion for a new trial.

General Hartwell replied.

Mr. Peters argues further.

General Hartwell asks that defendant be allowed
W. R. S. twenty-four hours in which to file, bond after entry of judgment.

Court takes the matter under advisement for decision at 1:30 P. M.

At 12 M. Mr. Hartwell presents motion for time to file bond.

The Court orders Clerk to enter up judgment in favor of plaintiff against defendant this day.

The Court states: "No judgment having been heretofore entered, the Court is of the opinion that the bond required by statute relating to such judgment could not be filed until the judgment was entered, and therefore will grant defendants' motion for time to file his bond, said time to be two days from date hereof."

Mr. Prosser, Deputy Attorney General, notes exception.

76 In pursuance of Court's order, it is therefore ordered, adjudged and decreed that the plaintiff recover of the defendants' $25,000.00 damages and costs.

Court continues motion for a new trial to June 14th, 1904, at 9:30 A. M.

Taken from Record Term Minutes, page 324.

June 14th, A. D. 1904, at Page 332.

TERRITORY OF HAWAII, by Superintendent of Public Works, C. S. HOLLOWAY,
v.
COTTON BROTHERS & Co.

Damages.

Motion for a New Trial.

On motion of General Hartwell, attorney for Defendants, the Court orders continuance till Friday, June 17th, 1904, at 9:30 A. M.

77 Friday, June 17th, A. D. 1904, Page 340.

TERRITORY OF HAWAII, by Superintendent of Public Works, C. S. HOLLOWAY,
v.
COTTON BROTHERS & Co.

Damages.

The Court, on motion of W. A. Kinney, orders Kinney, McClanahan & Cooper substituted as attorneys of record for defendants, in place of A. S. Hartwell.

TERRITORY OF HAWAII, by Superintendent of Public Works, C. S. HOLLOWAY,
v.
COTTON BROS. & Co.

Motion for New Trial.

Hearing on Motion.

Emil C. Peters, attorney for plaintiff, appearing with W. A. Kinney, counsel for defendants.

Mr. Peters renews his motion to deny hearing of motion for new trial, on ground that prerequisites have not been complied with by movant.

Court denies motion.

Kinney presents Motion for New Trial, and argues and completes same at 11:05 A. M.

Court orders brief filed in five days—five days—and three days. (Friday, Aug. 26, 1904); at Chambers; page 647 record Chamber Minutes, Vol. 1.

78 September 6th, 1904, Page 357.

TERRITORY OF HAWAII
v.
COTTON BROTHERS & CO.

On motion of E. C. Peters, Deputy Attorney General, counsel for plaintiff, the Court grants three days further time in which to file briefs.

Monday, February 27th, A. D. 1905, Page 597.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,
v.
COTTON BROTHERS & CO.

The following cablegram received at 9:30 A. M. by the undersigned, from Hon. George D. Gear, Second Judge of the above court at San Francisco, California, and filed as of record in this case in Clerk's office of aforesaid Court, to wit:—

"San Francisco, Cal. to Sims, Honolulu.
W. R. S. "2—27—1905. 11 A. M.
"In Territory *versus* Cotton order motion for new
W. R. S trial granted. Grounds mailed.
W. R. S. "Gear, Judge."

WM. R. SIMS, *Clerk.*

79 TERRITORY OF HAWAII, by C. S. HOLLOWAY, Sup't Pub. W'ks,
vs.
COTTON BROS. AND CO.

Damages.

Hearing Bill of Exceptions and Objections Cont. from 10/9/05.
E. C. Peters, Esq., Attorney Gen'l, appears for complain-t.
S. H. Derby, Esq., of Kinney *et al.* for defendants.

After further argument by counsel, Mr. Peters makes offer of proof as follows: "I desire to show at this time that the statements and allegations as contained in the proposed bill of exceptions referring to absence of Judge Gear from the Territory of Hawaii at the times in said proposed Bill of Exceptions stated, he was at such times as specified in said Bill of Exceptions in the City and County of San Francisco and without the jurisdiction of the Circuit Court of the First Judicial Circuit and Territory of Hawaii.

Mr. Derby objects to offer a proof on ground that it is improper to so supplement the Bill of Exceptions, further that such offer is too late and complainant has lost its rights by its laches.

The Court takes offer of proof under advisement and directs Briefs to be filed by Oct. 16", 1905.

Tuesday, Oct. 10", A. D. 1905.

(At the Head.)

[Minutes' Page]*
Chambers [M. F.]† 241.

(Endorsed:) I hereby certify that the within matter is a correct copy of record in books of Clerk Second Judge Circuit Court First Circuit this 10th day of October A. D. 1905. W. R. Sims, Clerk Filed Oct. 10th, 1905. W. R. Sims, Clerk.

80 FRIDAY, *January 12th*, A. D. 1906.

At Chambers, 9:40 a. m.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,
vs.
COTTON BROS. & COMPANY.

Hearing on Motion to Settle Bill of Exceptions.

E. C. Peters and F. W. Milverton Esqs. Attorney Gen'l and Deputy Attorney Gen'l appearing for Complainants.

W. A. Kinney and S. H. Derby Esqs. appearing for Defendants.

Mr. Milverton presents and reads Motion to settle Bill of Exceptions and argues.

Mr. Derby argues contra to further settlement.

Messrs. Peters and Kinney argue pro and con further.

The Court orders motion denied.

Exception by Attorney General.

81 In the Circuit Court First Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Supt. Public Works,
vs.
COTTON BROS. AND CO.

Case.

Certificate.

The undersigned Clerk of the Circuit Court First Circuit, Territory of Hawaii, hereby certifies that the Record of this case as prepared by Complainant has been compared with originals upon file in this Court and save and except the corrections indicated by his initials are full true and correct.

(Signed) WM. R. SIMS.

Honolulu, Jan'y 27th, A. D. 1906.

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*[Words enclosed in brackets inserted in pencil by clerk, W. R. S.]
[†Words enclosed in brackets erased in pencil by clerk, W. R. S.]

Endorsed: Circuit Court First Circuit Territory of Hawaii. Territory of Hawaii by C. S. Holloway, Supt. Public Works *vs.* Cotton Bros. & Co. Certificate of Clerk *re* Record of case. Filed Jan'y 27th, 1906. Sims, Clerk.

82 In the Supreme Court of the Territory of Hawaii, October, 1905, Term.

(82. Stamps.)

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff, and Plaintiff in Error,

v.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants, and Defendants in Error.

Case.

Petition for Writ of Error.

To the Honorable, the Supreme Court of the Territory of Hawaii:

Your petitioner, the Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, the above named plaintiff and plaintiff in error, respectfully shows and presents:

1.

That in a certain action lately pending in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, wherein the Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, plaintiff in error herein, was plaintiff, and E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, defendants in error herein, were defendants, the following proceedings were had:

(*a*) That heretofore, on the 23rd day of May, A. D. 1904, in the said Circuit Court, at its April, A. D. 1904 Term, said cause came on regularly for trial before a jury, the Honorable George D.
83 Gear, the then second Judge of said Court presiding. That thereafter, evidence having been adduced both by the plaintiff and the defendants, and the Court having instructed the jury upon the law of the case, the jury retired to consider its verdict, and on, to wit, the 27th day of May, A. D. 1904, the said jury rendered a verdict in Court in favor of plaintiff and against the defendants, in the sum of $25,000.00.

(*b*) That at the time of the rendition of said verdict the defendants in said cause excepted to the verdict as contrary to the law and the evidence, and gave notice of a motion for new a trial, and on, to wit, the 31st day of May, A. D. 1904, filed with the Clerk of the

Circuit Court of the First Judicial Circuit a motion for a new trial in said cause. That thereafter to wit, on the 7th day of June, A. D. 1904, said motion for a new trial so filed on the 31st day of May, A. D. 1904, by defendants as aforesaid, having come on to be heard before the said Honorable George D. Gear, the then Second Judge as aforesaid, plaintiff objected to the hearing of said motion for a new trial, and moved that the same be dismissed on the ground that the said defendants had failed and neglected within the time required by law, to file a sufficient bond of security, conditioned for the payment of all costs of motion for a new trial in case they, the said defendants, failed to sustain the same, and that they would not, to the detriment of plaintiff in said cause, remove or otherwise dispose of any property they might have liable to execution upon the judgment in said cause. That neither the said defendants, nor anyone in their behalf, had, prior to the 7th day of June, A. D. 1904, filed in said cause with the clerk of said Court, a or any bond as required by law, conditioned for the payment of all costs of motion for a new trial, in case they, the said defendants, failed to sustain
84 the same, and that they would not, to the detriment of plaintiff in said cause, remove or otherwise dispose of any property they might have liable to execution upon the judgment in said cause.

(*c*) That the said plaintiff's objection to the hearing of the said motion for a new trial, so filed by defendants on the 31st day of May, A. D. 1904, as aforesaid, and said motion of plaintiff's that the same be dismissed on the ground that the said defendants had failed and neglected in the time required by law to file a bond of security as aforesaid, was overruled and denied respectively, and plaintiff then and there took exception to the overruling of said objection, and an exception to the denial of said motion, and each and both of said exceptions were allowed by the Court. That thereupon defendants made a verbal motion that they be granted twenty-four hours after entry of judgment within which to file a bond. Said motion was taken under advisement by the Court until 1:30 o'clock in the afternoon of the same day. That thereafter, and on said 7th day of June, A. D. 1904, and on or about the hour of 12 o'clock Noon, of said day, defendants, by their counsel, did present to His Honor the said Second Judge as aforesaid, a motion to extend time for filing of bond, the same being in substance that time for perfecting motion for a new trial by filing a bond as required by statute be extended for forty-eight hours. Thereupon the said Judge did grant the said motion, to which order of the Court the plaintiff then and there duly excepted, and said exception was allowed. That the said action so taken by the Court at 12 o'clock Noon, of said day, concerning said motion of defendants for further time within which to file a bond as required by statute, was had and taken in lieu of proceedings contemplated at the adjourned hour of 1:30 o'clock in the Afternoon, and no further proceedings were had upon said
85 motion for a new trial at 1:30 o'clock in the Afternoon, or at all on said day. That at the time of granting said motion of defendants' for further time within which to file a bond

upon their motion for a new trial, the Court did order the Clerk to enter up judgment in favor of plaintiff and against defendants, and the Clerk did then and there and thereupon enter the following minute order:

"In pursuance of Court's order it is therefore ordered, adjudged and decreed that the plaintiff recover of the defendants $25,000.00 damages, and costs."

That thereafter, and on, to wit, the said 7th day of June, A. D. 1904, said defendants did file in said Court and cause a further notice of motion for a new trial, in substance as follows:

"Judgment being this day entered against the defendants, on the verdict herein entered against them on May 26th last, the defendants now give notice of their motion herein filed for a new trial, on the ground therein named."

(*d*) That thereafter, and on, to wit, the 8th day of June, A. D. 1904, Henry Smith, Esq., Clerk of the Judiciary Department of the Territory of Hawaii, entered in said cause the following judgment, quoted with the omission of title of Court and Cause:

"Judgment, May 27th, 1904. This action by petition claiming $25,000.00 damages, came to the present Term of this Court, when the parties appeared and were at issue to the jury. Said cause having been heard and committed to the jury, they found for plaintiff to recover from the defendants the sum of $25,000.00 damages.

"Therefore it is adjudged that the plaintiff herein have and recover of the defendants the sum of $25,000.00 damages, and costs taxed at twenty ($20.00) Dollars.

"Entered this 8th day of June, A. D. 1904, as of the 27th
86 day of May, 1904.

By the Court.

(Sgd.) HENRY SMITH, *Clerk.*"

(*e*) That thereafter, and on, to wit, the 17th day of June A. D. 1904, William R. Sims, Esq., Clerk of the said Circuit Court, and particularly acting as Clerk for said Honorable George D. Gear, entered the following judgment in said cause:

"This action by petition claiming $25,000.00 damages, came to the August 1903 Term, and then by continuance to the present Term, when the parties appeared and were at issue to the jury.

"Said cause having been heard and commit-ed to the jury, they found for the plaintiff to recover $25,000.00 damages.

"Therefore it is adjudged that the plaintiff recover from the defendants $25,000.00, and costs taxed at Twenty ($20.00) Dollars.

"Entered this 7th day of June, 1904, as April Term 1904.

By the Court,

WM. R. SIMS, *Clerk.*"

(*f*) That thereafter, and on, to wit, the 26th day of August, A. D. 1904, said motion of defendants for a new trial was presented to the said Judge for argument, and then and there plaintiff again objected to the hearing of said motion by the Court, on the ground that the prerequisites as to bond upon motion for a new trial, as

required by law, had not been complied with, which objection of plaintiff was overruled by the Court, to which ruling of the Court plaintiff then and there duly excepted. That said motion for a new trial was thereupon argued and submitted, and the Court ordered that the parties file briefs thereon.

(*g*) That thereafter, and on, to wit, the 7th day of December, A. D. 1904, the said Honorable George D. Gear did depart from the Territory of Hawaii, and remain absent therefrom and con-
87 tinue without the jurisdiction of the Territory of Hawaii until after the 20th day of March, A. D. 1905. That during all the time the said George D. Gear was absent from the Territory of Hawaii, and without its jurisdiction, he was in the City and County of San Francisco, State of California. That the said George D. Gear was appointed a Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on the 2nd day of March, A. D. 1901, and took his oath as such Judge on the 8th day of April thereafter. That Honorable Alexander Lindsay Jr., the Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, was appointed a Judge of said Circuit Court, as successor of the said George D. Gear, on the 3rd day of March, A. D. 1905, and took his oath as said Judge on the 20th day of March thereafter.

(*h*) That on, to wit, the 27th day of February, A. D. 1905, the said William R. Sims, Clerk as aforesaid, did receive the following cablegram:

"San Francisco, Cal., to Sims, Honolulu. 2–27–1905, 11 A. M. In Territory *versus* Cotton Brothers order motion for new trial granted. Grounds mailed. Gear, Judge."

and the said William R. Sims, Clerk as aforesaid, did thereupon enter in said cause the following Minutes:

"Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works, Plaintiff,

vs.

Cotton Brothers Co., Defendants.

"The following cablegram received at 9:30 A. M. by the undersigned from Honorable George D. Gear, Second Judge of the above Court, at San Francisco, Cal., and filed as of record in this case in Clerk's office of aforesaid Court, to wit:

" 'San Francisco, Cal., To Sims, Honolulu, 2–27–1905,
88 11 A. M. In Territory of Hawaii *versus* Cotton Bros. order motion for a new trial granted. Grounds mailed. Gear, Judge.' "

(*i*) That thereafter, and on, to wit, the 4th day of March, A. D. 1905, said William R. Sims, Clerk as aforesaid, did receive as regularly coming through the United States Mail, a decision by the said George D. Gear, purporting to grant the said defendants' motion for a new trial in said cause, which said purported decision was on said last named day filed in said cause, although on said 4th day of March, A. D. 1905, the said George D. Gear had ceased to be a Judge of the Circuit Court of the First Judicial Circuit of the

Territory of Hawaii. That the said cablegram hereinbefore quoted was sent to the said William R. Sims by the said George D. Gear, from San Francisco, State of California, and the said decision purporting to grant defendants' motion for a new trial in said cause was written by the said George D. Gear, at said San Francisco, and deposited in the mail by him at said last named place, directed to the said Sims, Clerk as aforesaid.

(*j*) That thereafter, and on, to wit, the 14th day of April, A. D. 1905, the said defendants did file in said cause their certain motion praying that a formal order be entered granting the defendants a new trial in said cause, and thereafter, and on, to wit, the 18th day of July, A. D. 1905, the said Alexander Lindsay Jr., Second Judge as aforesaid, did grant said motion and make and enter a judgment in said cause, that a new trial be had, to which judgment of the Court plaintiff duly excepted, and said exception was allowed by the court.

(*k*) That you- petitioner deems itself aggrieved by said judgment so made and entered in said cause on the 18th day of July, A. D. 1905, as aforesaid.

II.

That your petitioner is advised and believes that a mani-
89 fest error occurred and was committed by said Court, in said action as is shown by the assignment of errors filed herewith.

III.

That execution on said judgment has not been fully satisfied, and that six months has not elapsed since the date of said judgment.

Wherefore, plaintiff in error and petitioner herein prays that a writ of error may be issued from this Honorable Court to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, commanding the Clerk of said Court to certify up to this Honorable Supreme Court the record in said above mentioned action, including the certified transcript of the evidence taken, and other proceedings had in said Circuit Court in said cause, that the errors therein, if any may be corrected according to law.

Dated this 17th day of January, A. D. 1906.

TERRITORY OF HAWAII,
(Cgd.) By C. S. HOLLOWAY,
Superintendent of Public Works of the Territory of Hawaii.

(Signed) E. C. PETERS,
Attorney General, and
(Signed) FRED. W. MILVERTON,
Deputy Attorney General,
for Plaintiff in Error.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

C. S. Holloway, being duly sworn, deposes and says: That he is the Superintendent of Public Works of the Territory of Hawaii, and as such, and on behalf of the said Territory of Hawaii petitions for

said writ of error. That he has read the foregoing petition
90 for a writ of error, and knows the contents thereof; that the matters and things therein stated are true of his own knowledge, except those matters and things which are therein stated to have been alleged upon information, advice or belief, and as to those matters he believes them to be true.

(Signed) C. S. HOLLOWAY,
Superintendent of Public Works of the Territory of Hawaii.

Subscribed and sworn to before me this 17th day of January, A. D. 1905.

(Signed) JNO. M. KEA,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

91 In the Supreme Court of the Territory of Hawaii, October, 1905, Term.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff, and Plaintiff in Error,

v.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants, and Defendants in Error.

Case.

Assignment of Errors.

Now comes the above named plaintiff, Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, and says that in the record and proceedings in a suit lately pending in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, the same being an action on the case, wherein the Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, plaintiff in error herein was plaintiff, and E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, defendants in error herein were defendants, there is manifest error, and petitioner herein now makes and files and presents the following assignments of error upon which it will rely, as follows, to wit:—

I.

That the Court erred in entertaining and considering that certain pretended motion for a new trial, filed by defendants in said cause on the 31st day of May, A. D. 1904.

II.

That the Court erred in entertaining and considering that
92 certain pretended notice of motion for a new trial and pretended motion for a new trial filed by defendants in said cause on the 7th day of June, A. D. 1904.

III.

That the Court erred in refusing to sustain plaintiff's objection to the hearing of said pretended motion for a new trial filed by defendants in said cause on the 31st day of May, A. D. 1904.

IV.

That the Court erred in refusing to grant plaintiff's motion to dismiss that certain pretended motion for a new trial filed by defendants in said cause on the 31st day of May, A. D. 1904.

V.

That the Court erred in granting the defendants forty-eight hours from and after the 7th day of June, A. D. 1904, within which to file a bond as required by law, upon their pretended motion for a new trial.

VI.

That the Court erred in not, on the 26th day of August, A. D. 1904, sustaining plaintiff's objection to the consideration and entertainment by the Court of a pretended motion for a new trial by defendants in said cause, on the ground that the prerequisites had not been complied with upon said pretended motion, in the manner as required by law.

VII.

That the Court erred in receiving and filing on the 27th day of February, A. D. 1905, a cablegram purporting to grant a new trial in said cause, transmitted from San Francisco from George D. Gear Esq., who was at that time in the City and County of San Francisco, State of California.

93 VIII.

That the Court erred in receiving and filing on the 4th day of March, A. D. 1905, that certain pretended decision in said cause, purporting to grant defendants a new trial therein, said pretended decision having been written by George D. Gear Esq., while at San Francisco, in the State of California, and being filed after the term as Judge of the First Circuit Court, Territory of Hawaii, of the said George D. Gear Esq. had expired.

IX.

That the Court erred, upon said motion of defendants that an order be entered granting a new trial in said cause, in considering the said cablegram so received on the 27th day of February, A. D. 1905.

X.

That the Court erred, upon said motion of defendants that an order be entered granting a new trial in said cause, in considering the said decision so received on the 4th day of March, A. D. 1905.

XI.

That the Court erred in entering Judgment on the 18th day of July, A. D. 1905, granting the defendants a new trial in said cause.

TERRITORY OF HAWAII,

(Sgd.) By C. S. HOLLOWAY,

Superintendent of Public Works of the Territory of Hawaii.

94 In the Supreme Court of the Territory of Hawaii.

October, 1905, Term.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff, and Plaintiff in Error,

v.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants, and Defendants in Error.

(Stamped $1.)

Case.

Know all men by these presents: That we, The Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, as Principal, and C. M. White, of Honolulu, Island of Oahu, Territory aforesaid, as Surety, are held and firmly bound unto E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, defendants in error above named, and their heirs, administrators and assigns, in the penal sum of One Hundred Dollars ($100.00), for the payment of which truly to be made we do by bind ourselves, our and each of our respective heirs, administrators and assigns, jointly and severally by these presents.

The condition of this obligation is such, That Whereas upon the date hereof the above bounden Principal, the plaintiff in error, did file a petition for a Writ of Error in the Supreme Court of the Territory of Hawaii, directed to the Clerk of the Circuit Court of the First Judicial Circuit of said Territory, commanding him to forthwith send up to said Supreme Court the record and all exhibits filed in said proceedings, and transcript of the evidence;

95 Now, therefore, shall the above bounden Principal fail to sustain this Writ of Error, and shall pay in case thereof the

judgment in the above entitled cause, then this obligation is to be null and void, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 17th day of January, A. D. 1906.

TERRITORY OF HAWAII,
(Signed) By C. S. HOLLOWAY,
Superintendent of Public Works of the Territory of Hawaii.
(Signed) C. M. WHITE.

Endorsed: Supreme Court Territory of Hawaii. Territory of Hawaii by C. S. Holloway, Supt. Public Works *v.* E. J. Cotton, C. E. Cotton and James B. Agassiz, Partners under firm name of Cotton Bros. & Co. Bond on Writ of Error.

96 In the Supreme Court of the Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff in Error,

v.

E. J. COTTON, C. E. COTTON, & JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants in Error.

Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the County of Oahu or his Deputy:

You are commanded to serve upon E. J. Cotton, C. E. Cotton and James B. Agassiz, copartners doing business under the firm name of Cotton Brothers & Company, Defendants in Error above named, and upon Kinney, McClanahan & Cooper, their attorneys, the annexed petition for a Writ of Error, Assignment of Errors and Notice that a Writ of Error has issued in the above entitled action that they take such action in the premises as they may be advised thereunto within twenty days after service hereof.

($2. Stamps)

And have you then there this Writ with full return of your doings thereon.

Witness the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, County of Oahu, this 17th day of January 1906.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

Endorsed: L. 6369 Supreme Court Territory of Hawaii. Territory of Hawaii *v.* Cotton Bros. & Co. Summons. Issued at 2-40 o'clock P. M. Jan. 17, 1906. George Lucas, Clerk. Returned at 1:40 o'clock P. M. January 18, 1906. J. A. Thompson, Clerk.

97 *Return of Service.*

Served the within Summons as follows:

On E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, Defendants in Error, by delivering to Augustus S. Cantin, Attorney in fact of said Cotton Brothers & Company, at Honolulu, Island and County of Oahu, Territory of Hawaii, on this 17th day of January, 1906, a true and certified copy of the within Petition for Writ of Error, Assignment of Errors, Bond and Notice, and at the same time showing the said Augustus S. Cantin the original; and upon Messrs. Kinney, McClanahan & Cooper, Attorneys for the said Cotton Brothers & Company, by delivering to E. B. McClanahan Esq., one of the members of the firm of said Kinney, McClanahan & Cooper, at Honolulu, Island and County of Oahu, on this 17th day of January, 1906, a true and certified copy of the within Petition for Writ of Error, Assignment of Error, Bond and Notice, and the same time showing him, the said E. B. McClanahan, Esq., the original.

Dated, Honolulu, Oahu, January 17th, 1906.

(Signed) GEO. C. SEA,
Deputy High Sheriff, Territory of Hawaii.

98 (Section 1452, Civil Laws, Page 556.)

In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff in Error,

v.

E. J. COTTON, C. E. COTTON, & J. E. AGASSIZ, Defendant- in Error.

($2. Stamps.)

Writ of Error.

The Territory of Hawaii to W. R. Sims, Esquire, Clerk Circuit Court, First Circuit:

Whereas, in an action lately pending before the Circuit Court of the First Circuit, in which the said Territory of Hawaii by C. S. Holloway, Supt. Public Works is plaintiff, and the said E. J. Cotton, C. E. Cotton & J. E. Agassiz is defendant error is alleged to have occurred as appears by the assignment of errors on file in this Court, you are commanded forthwith to send up to this Court the record and the exhibits filed in said proceedings.

Witness, the Hon. W. F. Frear Chief Justice of the Supreme Court, at Honolulu, Territory of Hawaii, this 17th day of January 1906.

By the Court:

(Signed) GEORGE LUCAS,
Clerk Supreme Court.

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above mentioned
99 cause.

(Signed) WM. R. SIMS,
Clerk Circuit Court, First Circuit.

Dated Honolulu, T. H. Jan'y 17th 1906.

Endorsed: L. 6369. Supreme Court Territory of Hawaii. Territory of Hawaii by C. S. Holloway Superintendent of Public Works Plaintiff in Error *v.* E. J. Cotton, C. E. Cotton & J. E. Agassiz defendant in Error. Writ of Error. Issued at 2-40 o'clock P. M. Jan. 17, 1906. George Lucas, Clerk. Returned at 2:55 P. M. Jan. 17 1906, George Lucas, Clerk.

100 In the Supreme Court of the Territory of Hawaii, October, 1905, Term.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff, and Plaintiff in Error,

v.

E. J. COTTON, C. E. COTTON, & JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants, and Defendants in Error.

Case.

Notice.

To the above named defendants in error, and to Messrs. Kinney, McClanahan & Cooper, their attorneys:

You and each of you will hereby please take notice that a Writ of Error has issued from the Supreme Court of the Territory of Hawaii, to the Circuit Court of the First Judicial Circuit of said Territory in the above entitled cause.

Dated this 17th day of January, A. D. 1906.

Yours respectfully,

TERRITORY OF HAWAII,
(Sgd.) By C. S. HOLLOWAY,
Superintendent of Public Works of the Territory of Hawaii.

E. C. PETERS,
Attorney General, and
FRED. W. MILVERTON,
3rd Deputy Attorney General for Plaintiff in Error.

101 Endorsed: Supreme Court Territory of Hawaii. October Term, 1905. * * * Session 190– Territory of Hawaii by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii. Plaintiff & Plaintiff in Error. *v.* E. J. Cotton, C. E. Cotton & James B. Agassiz, copartners doing business under the firm name of Cotton Brothers & Company. Defendants & Defendants in Error. Petition for Writ of Error, Assignment of Errors, Bond and Notice. Filed Jan. 17, 1906. George Lucas, Clerk; E. C. Peters Attorney General and F. W. Milverton 3rd Dep. Att'y Gen'l for Plaintiff in Error.

102 (Section 1170, Civil Laws.)

In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII
v.
COTTON BROTHERS & CO.

Request for a Substitute Justice.

To Hon. J. T. De Bolt:

Mr. Justice Hartwell being* disqualified to sit with us in the above entitled cause, we, the remaining Justices of the Supreme Court, hereby request and authorize you to sit with us and hear and determine the said cause.

Dated the 27th day of January 1906.

(Signed) W. F. FEAR.
(Signed) A. A. WILDER.

Attest:
(Signed) GEORGE LUCAS, *Clerk.*

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*Unable through illness, etc., or disqualified.

Endorsed: Supreme Court Territory of Hawaii Territory of Hawaii *v.* Cotton Brothers & Co. Request for a Substitute Justice. Filed January 27 1906 George Lucas, Clerk.

103 In the Supreme Court of the Territory of Hawaii, October, 1905, Term.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff, and Plaintiff in Error,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants, and Defendants in Error.

Case.

Motion to Quash Writ of Error.

To the Honorable Supreme Court of the Territory of Hawaii:

Now come the defendants herein, by their attorneys Kinney, McClanahan & Cooper, and move this Honorable Court that the Writ of Error issued herein on the 17th day of January A. D. 1906 be quashed and dismissed.

This motion is based on the whole record in said cause and especially on the following grounds appearing from said record:

1. That none of the rulings sought to be reviewed on the writ of error herein are reviewable on a writ of error.

2. That there is no final judgment herein to which a writ of error may be taken, nor any judgment at all by which plaintiff is or can be aggrieved.

3. That the formal order of the Second Judge of the Circuit Court of the First Circuit herein, wrongly described as a judgment, to correct which the writ of error was issued is not a final judg-
104 ment or any judgment, but is an interlocutory ruling in said cause.

4. That said formal order is not reviewable on a writ of error at this time.

5. That a new trial was granted in the above cause by a decision filed on March 4th, 1905, to which no exception was taken by plaintiff and to which no writ of error was sought by plaintiff within six months or at all.

6. That plaintiff has already attempted to proceed by way of a bill of exceptions in the above cause and therefore cannot pursue his remedy, if any, by way of a writ of error without first discontinuing said bill of exceptions.

7. That said writ of error was granted on a petition stating facts not appearing on the record herein and misstating the facts as appears from said record.

8. That said writ of error is brought to correct interlocutory rulings made over six months before the issuance of said writ of error.

9. That said writ of error comes too late.

10. That plaintiff has waived, abandoned and forfeited his right to review either by bill of exceptions or writ of error the ruling and

order of Judge Lindsay granting and allowing defendants a new trial.

Dated, Honolulu, January 19th, 1906.

(Signed) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Notice of Motion.

To E. C. Peters, Attorney General of the Territory of Hawaii, Counsel for the Plaintiff:

Please take notice that we shall present the foregoing
105 motion to the Honorable Supreme Court of the Territory of Hawaii on Thursday the 25th day of January A. D. 1906, at 10 o'clock a. m., or as soon thereafter as counsel may be heard and ask that the same be allowed.

(Signed) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Endorsed: No. —. Supreme Court Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. & Co. Motion to Quash Writ of Error. Filed Jan. 19 1906 at 12 M. George Lucas, Clerk. Kinney, McClanahan & Cooper 303-305 Judd Bldg. Hololulu Attorneys for Def'ts. (Office No. —.)

106 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,

v.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Partners, under the Name of Cotton Bros. & Co.

Error to Circuit Court, First Circuit.

Argued January 27, 1906; Decided March 8, 1906.

Frear, C. J., Wilder, J., and Circuit Judge De Bolt in Place of Hartwell, J.

Order for new trial—when and when not interlocutory for purposes of writ of error.—An order granting a new trial is usually interlocutory and not reviewable on error, whatever may be the rule on exceptions, until after the new trial has been had and final judgment entered; but if there was no jurisdiction to make the order, it is final in its nature and may be brought up immediately on error.

Bond on new trial—must be filed within 10 days after verdict, though judgment not entered.—Under R. L., Sec. 1805, on a motion for a new trial, the bond for costs and against disposition of property to plaintiff's detriment, as well as the motion itself, should be filed within ten days after verdict, whether judgment has been entered or not.

Id.—may be waived, how.—The filing of such bond within the time prescribed by the statute may be waived either expressly or by implication but the mere fact that plaintiff's counsel did
107 not raise the objection that no bond had been filed on the seventh day after verdict when defendants' counsel intended to present the motion according to notice given by him, but instead sent word to the court that he was not ready, and desired a postponement, being then otherwise engaged, would not constitute a waiver, or prevent his raising the objection on the eleventh day after verdict, which was the day to which the postponement was made on the seventh.

108 *Opinion of the Court by Frear, C. J.*

On May 27, 1904, at the April term of the Circuit Court of the first circuit, the plaintiff obtained a verdict for $25,000 damages for the loss of its dredger through the alleged negligence of the defendants. On May 31 the defendants moved for a new trial and gave notice that the motion would be presented for argument on June 3 or as soon thereafter as counsel could be heard. Accrued costs were paid and a deposit made for the costs of the motion, but no bond was filed conditioned for the payment of the costs of the motion and that the defendants would not to the detriment of the plaintiff remove or otherwise dispose of any property they might have liable to execution on the judgment, as required by Sec. 1805 of the Revised Laws. On the day noticed for the presentation of the motion June 3, defendants' counsel appeared but plaintiff's counsel sent word to the court that he was not ready, being otherwise engaged, whereupon a postponement was ordered at his request until June 7, when he moved that defendants' motion be dismissed for failure to file a bond as above mentioned, having given no intimation previously of his intention to so move. The facts as to what plaintiff's counsel did on June 3 appear only by an affidavit made by defendants' counsel and filed in the circuit court on June 7 in support of a motion that "time for perfecting motion for new trial by filing bond as required by statute be extended forty-eight hours from date." The affidavit and motion were made and filed after argument had been made on the same day by counsel on both sides upon plaintiff's motion to dismiss the motion for a new trial because of failure to file the bond required, and after defendants' counsel had asked orally for twenty-four hours in which to file the bond after entry of judgment, no formal judgment having been entered previously. The court, Judge Gear sitting, had taken the question of dismissing the motion for a new trial under advisement until 1:30 p. m., but at 12 m., upon defendants' counsel present-
109 ing the motion and affidavit above referred to, ordered the clerk to enter judgment and held that the bond required by the statute could not be filed until the judgment was entered, and therefore granted defendants' motion for two days' time in which to file the bond, to which ruling plaintiff excepted. It seems that two formal judgments were entered, one on June 7, "as of April term,

1904," by one clerk; the other June 8 "as of the 27th day of May, 1904," by another clerk. The bond was presented and approved June 7 and filed the next day, and on June 7 defendants' counsel gave notice that the motion for a new trial filed May 31 would be presented for argument on June 14 or as soon thereafter as counsel could be heard. The matter was continued on the 14th to the 17th, when the plaintiff renewed its objection to the hearing of the motion for a new trial on the ground that the movant had not complied with the statutory requirements. The objection was overruled and argument was heard on the motion for a new trial. Before deciding the motion Judge Gear went to California, but defendants contend that his absence from the Territory does not appear from the record and cannot be noticed judicially.

On February 27, 1905, the clerk received and filed a cablegram dated San Francisco, Cal., February 27, 1905, as follows: "In Territory *v.* Cotton order motion for new trial granted. Grounds mailed. Gear, judge." On March 4, 1905, the clerk received by mail and filed an opinion ordering a new trial signed by "Gear, judge;" also a letter dated San Francisco, Cal., Feb. 25th, 1905, from "Geo. D. Gear," stating that he had been kept "here" by sickness and that he sent 2 memoranda for the clerk to file and hoped they would get "there" in time, one of the memoranda apparently being the opinion just mentioned. Judge Gear's term of office was for four years from March 2, 1901, and therefore expired at midnight March 2, 1905, if not at midnight the preceding day. On April 14, 1905, defendants moved the court, Judge Lindsay, who was Judge
110 Gear's successor, sitting, that a formal order be entered granting a new trial, which motion was granted July 17, 1905, the formal order being entered the next day, to which the plaintiff excepted. On January 17, 1906, the plaintiff sued out this writ of error to reverse the order of Judge Lindsay granting a new trial. The defendants now move to quash or dismiss the writ, mainly on the ground that a writ of error does not lie to an order granting a new trial, contending that such an order is not a final judgment, but an interlocutory ruling only. The question is whether the writ should be quashed or dismissed on this ground.

Some courts hold that a ruling on a motion for a new trial, whether granting or refusing a new trial, is discretionary with the trial judge and cannot be reviewed by the appellate court on appeal, error or exceptions, whether before or after a new trial has been had, if one has been ordered, unless at least the ruling was based on matters occurring or discovered after the first trial and in regard to which therefore no exceptions could have been taken before verdict or judgment. Other courts, while holding that such a ruling is not so far discretionary as to preclude review within certain limits, hold nevertheless that it is interlocutory and cannot be reviewed before a new trial has been had, if one has been ordered, and, indeed, cannot ordinarily be made the direct subject of appeal, error or exceptions, but can be reviewed only upon a review of the final judgment in the case. See, in general, *Wheeler v. U. S.*, 159 U. S. 523; *Baker v. White,* 92 U. S. 176; *Waterhouse v. Rock I. A. M. Co.,* 97 Fed.

466; *Young v. Shallenberger*, 53 Oh. St. 291; *People v. Judge*, 41 Mich. 5; *Williams v. La Valle*, 64 Ill. 110; *Magill v. Lyman*, 6 Conn. 59; *Johnson v. Parrotts*, 46 Neb. 51; *White v. Pease*, 15 Utah 170; *Commonwealth v. Morrison*, 134 Mass. 189; *Samuel v. Judin*, 6 East 333.

It is contended by the defendants that in this jurisdiction an order granting a new trial, whatever may be the rule with respect to an order refusing a new trial (see *Harrison v. Magoon*, 16 Haw.
111 170, 332), is interlocutory, and, on the analogy of decisions in cases brought up on exceptions to other interlocutory rulings, cannot be reviewed on error before final judgment in the case. The interlocutory rulings referred to, which it has been held cannot be reviewed on exceptions before final judgment, were orders overruling demurrers, pleas of former conviction and the like. See *Bathrop v. Kona Coffee Co.*, 10 Haw. 398, and cases there cited; also *Territory v. Ah Quong*, 14 Haw. 108. It has not been held that an order granting a new trial cannot be brought up immediately on exceptions, although in *Ahmi v. Cornwell*, 14 Haw. 301, where such a contention was made on the ground that the order was interlocutory, the court based its opinion, that the exception could be entertained, upon the ground, not that the order granting a new trial was not interlocutory or that if it was it could be reviewed immediately, but that the exceptions had been certified up by the trial court under an express statutory provision permitting it in its discretion to certify exceptions to interlocutory rulings. In other cases, however, in which objection was made to entertaining exceptions to orders refusing new trials, based on the ground that such orders were discretionary, the court has expressly stated that, whatever might be the rule elsewhere, in this jurisdiction an order either denying or granting a motion for a new trial may be brought up on exceptions. See *George v. Holt*, 9 Haw. 135; *Republic v. Hapa*, 9 Haw. 622. (See also *Ah Chu v. Sung Kwong Wo. Co.*, 5 Haw. 291.) It is true that in these cases the court did not expressly say when the order or ruling might be brought up, that is, whether before or after final judgment, but there can be no doubt that it meant immediately; it of course meant that a ruling on a motion for a new trial could be made the direct and independent subject of a bill of exceptions, not merely that it could be considered on a review of the final judgment itself. These decisions were made about the
112 same time as most of the decisions above referred to which held that other interlocutory rulings could not be brought up immediately on exceptions and the second of these decisions was made after most of those cases were decided. The statement made in some of those cases, to the effect that the fact that exceptions to such other interlocutory rulings had been entertained in some cases did not establish the right to bring such exceptions immediately, because the practice had generally been the other way and because when such exceptions had been entertained it was by consent or because the point was not noticed, does not apply to rulings on motions for new trials; for, as stated in *George v. Holt*, the practice had been different in respect to exceptions to such rulings. In-

stances of entertaining exceptions to orders granting new trials may be found in the same volume of the reports. See *Kaanaana v. Keahi*, 9 Haw. 318; *Macfarlane v. Lowell*, 9 Haw. 438. Of course in such cases where the ruling of the trial judge is not on a pure question of law considerable weight is given to his opinion, particularly if he grants a new trial. The rule of the court, which as often stated in the decisions, was based on the statute in regard to motions for new trials, also shows unmistakably that it was regarded as correct practice to bring an order granting or refusing a new trial directly to this court on exceptions. Rule VIII, 5 Haw. iii. See also Rule 15 of the circuit courts, 9 Haw. 718, adopted soon after the reorganization of the judiciary department.

In view of the foregoing we prefer not to pass upon the question whether an order granting a new trial may or may not be brought to this court immediately on exceptions, and it is unnecessary to do so, for, assuming that it cannot, it does not follow that it can be brought here immediately by writ of error. The practice in regard to exceptions has been different from that in regard to error. The statute in regard to exceptions is broader than that in regard to error. Exceptions and error are inherently proceedings of different character. On exceptions, various specific rul-
113 ings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review; only so much of the record is brought up as is necessary for passing upon the specific exceptions; the decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant as shown by the entire case. Orders granting new trials are no doubt of an interlocutory nature and error in general lies only to review a final judgment, and we accordingly hold that ordinarily an order granting a new trial cannot be brought up immediately by writ of error. Perhaps this view is supported to some extent by analogy by the cases of *Est. of Banning*, 9 Haw. 357, and *Lyman v. Winter*, 15 Haw. 424, which were cases of appeals from a circuit judge sitting in probate and from a district magistrate respectively.

If, however, as contended by the plaintiff, the circuit court had no power to make the order granting a new trial when it was made, it was a final judgment. In such case the court, having no jurisdiction over the verdict already obtained, could not vacate it or set it aside for the purpose of a new trial upon the merits of the original action. The motion for a new trial would in such case have to be regarded as a new proceeding and the order granting a new trial would be the final order in that proceeding and therefore reviewable. *Hume v. Bowie*, 148 U. S. 245; *Macfarland v. Brown*, 187 U. S. 244; *Deering v. Creighton*, 26 Or. 556. The question therefore, is whether the circuit court had jurisdiction of the motion for a new trial and power to grant the motion.

The defendants' failure to file the required bond within the ten days prescribed by the statute was fatal unless it was
114 waived by the plaintiff. The defendants contend strenuously that since the bond is required by the statute to be conditioned that the defendant will not, to the detriment of the plaintiff, dispose of any property he may have liable to execution on "such judgment," it could not be filed and therefore was not required to be filed before the entry of judgment, which in this case, as shown above, occurred the eleventh day after the verdict, and that therefore the bond, which was filed on the day of entry of judgment, was filed in sufficient time. Of course the judge could not extend the time prescribed by the statute. See *Kapiolani Est. v. Peck*, 14 Haw. 580; *Kapiolani Est. v. Thurston*, 16 Haw. 147. The question is solely, what did the statute require? This provided, Revised Laws, Sec. 1805, since amended, that " any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security, conditioned," etc., "and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after rendition of verdict or judgment, for a new trial, for any cause for which by law a new trial may and ought to be granted." The preceding section, since amended, provided that "judgment shall be entered by the clerk, without motion, immediately upon the rendition of a verdict, or of a judgment of the court, or of a judge at chambers, and execution may issue thereon at any time thereafter, when called for, unless notice is given at the time of rendering the verdict, or judgment, of a motion for a new trial and the filing of a bill of exceptions and bond, as provided by statute, within ten days after the rendition of such verdict or judgment." There are several possible constructions of the words "such judgment" in section 1805. For instance, these words may have been used in a broad sense to denote a verdict as well as a judgment, for the words "verdict or judgment" previously used in this section are used "as set forth in the last preceding section," in which the word "judgment" is used not in the sense of a judgment
115 entered on a verdict but in the sense of a judgment by the court in the nature of a verdict, as in a jury waived case, and in both sections the verdict and judgment are expressed to be those rendered, not those entered. Or, if such words are not used in that sense, but in the sense of a judgment rendered as distinguished from entered upon a verdict, they may refer to the judgment rendered in contemplation of law, which is the only judgment that is usually rendered on a verdict in a civil case in this Territory, for seldom if ever does the court formally render a judgment upon a verdict in this jurisdiction. Again, if these words refer to the judgment entered as distinguished from the judgment rendered, they may mean the judgment entered in contemplation of law, that is, as required by section 1804, and perhaps presumed in law to have been entered whether entered in fact or not. See *Rose v. Smith*, 5 Haw. 377, 380. As matter of fact the judgment in this case was entered *nunc pro tunc*. Or, these words might

refer to such judgment as may be entered. We believe that usually judgment is not entered pending a motion for a new trial, and that in such cases the bond is usually or often conditioned against the disposal of property liable to execution on such judgment as may be entered upon the verdict. Whatever the true construction, it is obvious that construing the section as a whole and in connection with the preceding section, the motion must be presented within ten days after verdict and the bond must be filed at least within the same time, for the motion cannot be made except upon filing the bond and there was certainly no intention that a motion for a new trial could be made or perfected by filing a bond and paying costs at any time after formal entry of judgment however long that might be after verdict. Even if judgment had to be entered before the bond could be filed, it would be the duty of the movant to see that it was entered within the ten days or forfeit his right to move for a new trial. That the bond must be filed within ten days after verdict is established by former practice and de-
116 cisions. See *Joliva v. Kaulukou*, 7 Haw. 731; *Gonsalves v. Brito*, 8 Haw. 254; *Ferreira v. Honolulu R. T. & L. Co.*, 16 Haw. 797; see also *Briggs v. Mills*, 4 Haw. 450; *Napahoa v. Chinese Union*, 7 Haw. 379. This is also the construction placed upon the statute by the rules of court above referred to. Indeed, the question has not been whether judgment had to be entered before the bond was filed or whether the motion could be made or bond filed after entry of judgment, even though more than ten days after verdict, but whether judgment could properly be entered at all after the filing of the motion and before its disposition, or whether if entered immediately after verdict but before the filing of a motion for a new trial it was not vacated by the filing of the motion. See *Herblay v. Norris*, 9 Haw. 121; *Byrne v. Allen*, 10 Haw. 327; *Kukea v. Keahi*, 10 Haw. 505.

The question then is whether the failure to file a bond within the required time could be waived and if so whether it was waived. Many courts hold that although formal or technical defects in bonds of this nature may be waived, substantial defects, such as the want of a surety on the bond and, *a fortiori*, the failure to file any bond within the required time, cannot be waived either by implication, as by entering a general appearance or joining in error or submission on the merits, or by an express waiver, whether oral or in writing,—the argument being that the requirement of a bond is not wholly for the benefit of the adverse party but partly for the purpose of discouraging frivolous and vexatious litigation as a matter of public policy, and that jurisdiction being conditioned upon compliance with the statutory requirements cannot be conferred by consent. *Ten Brook v. Maxwell*, 5 Ind. App. 353; *Lyell v. Guadaloupe*, 28 Tex. 57; *Santom v. Ballard*, 133 Mass. 465; *Henderson v. Benson* 141 Mass. 218; *Marx v. Lewis*, 24 Nev. 306 (53 Pac. 600); *Cape Fear, etc., Co. v. Costen*, 63 N. C. 264. Probably, however, no court would hold that the objection of the want of a bond would be good if made for the first time after de-
117 cision of the motion for a new trial or appeal as the case might be. In this jurisdiction, it was held in *Paakuku v. Komoike-*

huchu, 3 Haw. 652, that appellee's counsel could not by stipulation in writing waive a failure to file the appeal bond within the time prescribed by statute, but in *Coleman v. Coleman*, 5 Haw. 300, in which appellee's counsel expressly withdrew an objection previously made on the ground that the costs had not been paid within the prescribed time, the court, in passing upon the contention made after the decision on appeal that the decision was void for want of jurisdiction, held that the objection of nonpayment of costs had been waived and expressly overruled the *Paakuku* case in so far as it held such an irregularity could not be waived by counsel, but stated also that it was distinguishable inasmuch as the question of want of jurisdiction had been raised in it, but had not been raised in the case then before the court, prior to the decision. The *Coleman* case has been considered as establishing the proposition in this jurisdiction that defects of the kind now in question may be waived by counsel and are waived by express stipulation to that effect prior to the expiration of the time prescribed by statute or by failure to raise the question at all until after decision. See *Spooner v. Rice*, 11 Haw. 429; *Est. of Kamakala*, 12 Haw. 264; *Hind v. Wilder Steamship Company*, 14 Haw. 219.

If there was a waiver in the present case it was by implication. What is sufficient to show such a waiver? A waiver partakes to some extent of the nature of an estoppel. It is sometimes called a quasi-estoppel. In general, unless it is express, it is shown either by such laches or by such inconsistent action as shows an intention not to rely upon the objection. For instance, moving for or consenting to repeated continuances after opportunity to raise the objection might be regarded as sufficient laches, and joining in error or submitting or agreeing to submit the matter upon its merits might be sufficient action of an inconsistent character. But what were
118 the facts here? There is nothing but the affidavit of defendants' counsel to show what was done by plaintiff's counsel before he raised the objection. It does not appear upon what Judge Lindsay based his opinion. Even if he found that there had been a waiver, he was in no better position than this court is to pass upon this question, for he had nothing before him but the affidavit referred to. There was nothing in the affidavit of which Judge Gear did not have as full knowledge and notice as the affiant. No counter affidavit was necessary. And yet Judge Gear did not find that there was a waiver but entertained jurisdiction upon the express ground, which we have held unsustainable, that the bond was filed in proper time. From his knowledge of the facts or his construction of the affidavit in the light of the facts as he knew them, he may have been of the opinion that there was no waiver. But let us assume that he did not so find, and take the affidavit at its face value.

The affidavit was apparently drawn with care with a view to making out as strong a case for the movant as the facts would warrant. It is not pretended that it shows laches. It can be relied on, if at all, only as showing inconsistent action, that is, the plaintiff's counsel consented to a hearing of the motion on its merits and thereby

waived the right to take the inconsistent position of contending that it was not properly before the court. But it is at best ambiguous, in so far as it is intended to show that plaintiff's counsel consented to an argument of the motion upon the merits. The material part for present purposes is as follows: "That said motion (for a new trial, filed May 31) was set for argument on Friday, June 3rd last being the eighth day after said verdict was rendered; that at the time set for argument of said motion defendants' counsel appeared, but plaintiff's counsel sent word to the court that he was not ready, being otherwise engaged; whereupon argument on said motion was postponed at the request of plaintiff's attorney until this Tuesday, June 7th, at which plaintiff's attorney moved that defendants'
119 motion be dismissed for failure to file a bond as above mentioned, having given no intimation previously of his intention so to do. Wherefore this affiant respectfully submits that he waived the same." This shows merely that plaintiff's counsel sent word to the court that he was not ready and requested a continuance because he was otherwise engaged. It is doubtful whether the date, June 7, was set by the court of its own motion or on the suggestion of defendants' counsel or at the request of plaintiff's counsel, that is, whether the postponement alone was at such request or the postponement to the particular day. It is at least still more doubtful whether plaintiff's counsel intended to agree to argue the motion upon its merits. We say "at least" because it seems so clear as to be hardly doubtful at all that no such consent was intended. The only possible contention for the defendants is that the plaintiff's counsel requested that argument on the merits of the motion should be continued, and that contention must be based solely upon an extremely ambiguous clause, which should be construed most strongly against the defendants—particularly when they seek to show a waiver. Nothing was said of the merits of the motion. It would be most natural for plaintiff's counsel to request merely that the hearing of the matter should be postponed and that is the most natural construction to place upon the clause in question. Moreover, the word "argument" in that clause would naturally have the same meaning as the same word in the preceding clauses of the portion of the affidavit above quoted, where it can mean nothing else than a hearing upon any questions that might properly arise upon the presentation of the motion. There is nothing whatever to indicate that either plaintiff's or defendants' counsel or the court made any allusion to the merits of the case or that there was any intention on the part of plaintiff's counsel to agree to argue the motion on its merits. The alleged setting of the argument for June 3 consisted merely of the usual notice given by the movant's counsel that the motion would
120 be presented for argument on that date or as soon thereafter as counsel might be heard. It was not for counsel on one side to confine the argument to the merits of the motion. There was no duty on the part of plaintiff's counsel to point out failures on the part of the defendants before the expiration of the time prescribed by statute for perfecting the motion. It does not appear that plain-

tiff's counsel knew on June 3 that no bond had been filed. He did not even appear and object to the motion on other grounds. He merely sent word that he could not appear at all at that time, and asked that the matter be postponed for that reason. A waiver is a matter of intention shown expressly or by implication, as by laches or inconsistent conduct. No such intention appears here. It is obvious that the request for postponement was for a different purpose and was not inconsistent with an intention to make any available objections to the motion. Indeed, if the plaintiff waived its objection of no bond merely because it did not raise it on June 3 when it did not attend at all, there would seem to be even greater reason for holding that the defendants waived their objection of plaintiff's laches or inconsistent conduct, for they did not raise that until after they had argued the question of no bond on its merits and after they had moved for an extension of time in which to file a bond. It is unnecessary to say whether the attorney general could waive a right of the Territory of this kind. See *Peacock v. Republic,* 11 Haw. 404.

In *Little v. Jack,* 68 Cal. 343, it was held that an appellee did not waive the right to a dismissal of an appeal for want of an appeal bond by stipulating to advance the appeal on the calendar for hearing. The court said: "There has been no such waiver in this case, unless the stipulation to have the case placed on the calendar out of its order for hearing constituted it. There is no allusion in the stipulation to the undertaking, and nothing to indicate an intention to waive it. By no rule of construction could it be held to be
121 a written consent of respondent to waive the filing of an undertaking." In a concurring opinion it was said: "It does not appear that the respondent's counsel, when he signed the stipulation, contemplated giving such consent. The stipulation above mentioned was signed with another and different object and intent, and to predicate of it that it consented that no undertaking on appeal should be filed would be to attribute to it an intent entirely foreign to the intent for which the stipulation was entered into, and which was in the minds of the parties when it was executed. Where an intent plainly appears, another and a different one cannot be implied." In *Howard v. Malsch,* 52 Tex. 60, an appeal having been taken but the transcript not having been filed, the appellees moved for affirmance, which was denied. The appellants moved for leave to file the transcript. Appellees appeared and resisted the motion but the court allowed the transcript to be filed. Subsequently the cause was continued by consent, which was made known on the part of the appellees through resident counsel on behalf of absent counsel. It was held that there was no waiver of even formal objections to the bond. See also *James v. Dexter,* 112 Ill. 489, and *Bubb v. Cain,* 37 Kan. 692 (16 Pac. 89). Of the four cases cited *contra,* three namely, *Ives v. Finch,* 22 Conn. 101, *Cason v. Laney,* 82 Tex. 317, and *Vernia v. Lawson,* 54 Ind. 485, are so obviously distinguishable from the present case as to require no comment. The remaining case, *Farnam v. Davis,* 32 N. H. 302, was an appeal from a justice

of the peace which was entered at the October term, 1853, of the appellate court, at which term the plaintiff entered his appearance as appellee and the cause was continued. He did not move to dismiss the appeal for want of a sufficient bond until the March term, 1854. There was not a total absence of a bond, but the bond had only one surety instead of two, which were held necessary under a law which "required sufficient sureties." It was held that this was an irregularity which could be waived, and which was waived,
122 the court saying, among other things, "the irregularity, then, is one which may be waived by the appellee; and we think he is to be considered as having waived it, when, having had reasonable opportunity to avail himself of the objection by a motion to dismiss the appeal for that cause, he neglects to do so. The requirements of the statute for his benefit can be dispensed with only by his consent; but it cannot be considered unreasonable to him and it certainly is but just to the appellant, to hold that that consent is to be understood as given when he enters his appearance at the appellate court, and suffers a continuance of the cause, without a suggestion that his rights have been disregarded in the mode of taking the appeal." This case, while it goes further than any other case that has come to our notice, does not go as far as the defendants ask us to go in the present case.

In view of the foregoing it will be unnecessary to decide whether Judge Gear's order for a new trial by cable or subsequently by mail, was void upon the ground that it was made in California and outside of his jurisdiction, or on the ground that the mailed decision was made after the expiration of his term of office.

The motion to quash or dismiss is denied.

E. C. Peters, Attorney General, and F. W. Milverton, Deputy Attorney General, for the Territory.

S. H. Derby (Kinney, McClanahan & Cooper on the brief) for defendants on the writ of error.

(Signed) W. F. FREAR.
(Signed) A. A. WILDER.
(Signed) J. T. DE BOLT.

Endorsed: Supreme Court Territory of Hawaii. Territory of Hawaii *vs.* Cotton Brothers. Decision. Filed March 8, 1906. George Lucas, Clerk.

123 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff and Plaintiff in Error,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Copartners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants and Defendants in Error.

Petition for Rehearing.

To the Honorable Supreme Court of the Territory of Hawaii:

Now comes the defendants hereby by their attorneys Kinney, McClanahan & Cooper, and petition this Honorable Court for a rehearing and review of its decision filed on March 6th, 1906, denying the defendants' motion to quash the writ of error herein, on the following grounds:

1. That vital points decisive of the case and which must be considered, if justice is to be done, were not presented to the court on the motion to quash through the inadvertence of counsel, said points being:

a. That Judge Gear's decision granting a new trial herein though perhaps voidable, was not void or without jurisdiction and hence is not subject to a collateral attack, the attack by means of the writ of error herein being collateral.

b. That Judge Lindsay's order of new trial herein was valid for the above reasons and in any event was at most voidable but not void, and hence was an interlocutory ruling not reviewable on a writ of error.

124 2. That the above points show that there was manifest error and mistake in the ruling on the motion to quash the writ of error herein (though through no fault of the court) and hence a rehearing should be had (Mahukaliilii *v.* Hobron, 4 Haw. 107; Kapiolani Estate *v.* Thurston, 17 Haw.).

This petition is based on the record and especially as defendants' brief on the merits on the aforesaid writ of error.

Dated March 23rd 1906.

(Signed) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendant.

I hereby certify that, in my opinion, the foregoing petition is well founded in point of law and that it is not interposed for purposes of delay.

(Signed) S. H. DERBY,
Of Counsel for Defendants.

Endorsed: No. —. Supreme Court Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. & Co. Petition for Rehearing. Filed March 23, 1906 at 2 P. M. George Lucas Clerk. Kinney, McClanahan & Cooper 303-305 Judd Bldg. Honolulu Attorneys for ——. (Office No. —.)

125 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

No. 50.

TERRITORY OF HAWAII, by C. S. HOLLAWAY, Superintendent of Public Works,

v.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Partners under the Name of Cotton Bros. & Co.

Error to Circuit Court, First Circuit.

Petition, filed March 23, 1906, for rehearing of defendants' motion to quash the writ. (For decision on motion, see *ante*, p. —.) Decided April 11, 1906.

Per curiam: The petition is denied.

McKinney, McClanahan & Cooper for petitioner.

(Signed) GEORGE LUCAS, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. & Co. Decision. Filed April 11, 1906. George Lucas, clerk.

126 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLAWAY, Superintendent of Public Works,

v.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Partners under the Name of Cotton Bros. & Co.

Error to Circuit Court, First Circuit.

Argued March 23, 1906; Decided April 9, 1906.

Frear, C. J., Wilder, J., and Circuit Judge De Bolt in place of Hartwell, J.

New trial—order for, when not interlocutory.—Although an order granting a motion for a new trial is ordinarily interlocutory and not reviewable on error before final judgment, it is final and reviewable if it is made in what must be considered a new

proceeding, as when the court had no power to make it. In order to be final for the purposes of review it need not be absolutely void so as to be subject to collateral attack.

Id.—when too late for court to order of own motion.—A trial judge cannot grant a new trial of his own motion in a civil case at the second term after that in which the verdict was rendered and judgment entered, and, *a fortiori*, his successor cannot in vacation after the third term after verdict and judgment; but it is held in this case that the decision of the trial judge and the order of his successor for a new trial were not made of their own motion but in response to motions by the defendants.

Id.—power or duty of trial judge's successor to order.—The rule that a successor to a trial judge should grant as matter of
127 course a motion for a new trial which has been made and perfected within the proper time—because the movant has a right to have the motion decided and the succeeding judge cannot decide it for want of knowledge of the facts and the trial judge cannot because of his death or the expiration of his term of office—has no application when the movant has no right to have the motion decided for the reason that it was not perfected by the filing of a bond within the prescribed time.

Id.—writ of error which brings up order for, brings up decision on which order was based.—When an order for a new trial made by a succeeding judge is merely the formal order entered in pursuance of the decision of the trial judge and not an independent order, a writ of error brought within six months to review the order brings up also the decision though the latter was filed more than six months before the writ was issued. In such case the attack upon the decision is not collateral.

128 *Opinion of the Court by Frear, C. J.*

The facts are stated somewhat fully in the decision on the motion to quash, *ante*, —. Briefly, the defendants, after a verdict against them, moved for a new trial but failed to file the requisite bond within ten days after verdict as required by statute. The trial judge, Gear, holding that the ten days ran from judgment and not from verdict, allowed judgment to be entered and the bond filed after the expiration of the ten days from verdict but within ten days from judgment and heard the motion. He did not decide it, however, until the second term of court thereafter when, shortly before the expiration of his term of office, he cabled to the clerk from San Francisco "Order motion for new trial granted. Grounds mailed," and shortly after the expiration of his term of office the clerk received by mail from San Francisco the written opinion of the judge, concluding "a new trial should be granted." At the next term, that is, the third term after the verdict was rendered and the

motion for a new trial made, the defendants moved Judge Gear's successor, Judge Lindsay, that "a formal order be entered granting the defendants a new trial," which was done in vacation after the expiration of that term. The plaintiff then brought this writ of error to review that order.

The defendants moved to quash the writ on the ground that an order granting a new trial was interlocutory and therefore not the direct subject of a writ of error. We held, however, in the decision above referred to, that, although ordinarily an order granting a new trial was not reviewable on error immediately, that is, before final judgment after the new trial was had, whether reviewable immediately on exceptions or not, the rule was different when the trial court was without power to make the order when it was made, and that the trial court was without power to grant the motion for a new trial for the reason that the bond was not filed within ten days after verdict and that although the failure to file the bond
129 within the prescribed time could be waived by the plaintiff it was not waived.

The defendants now in their argument upon the merits of the writ, while conceding that the decision on the motion to quash was correct on the arguments then presented and that on its surface it finally disposed of the question of their right to the new trial, contend that there are other arguments, now presented, which show that it was in fact erroneous. It was suggested by the court during the argument that it might be a question whether that decision could virtually be reversed upon a consideration of the merits of the case or otherwise than on a reconsideration of the motion to quash, as, for instance, upon a rehearing of that motion. The defendants thereupon filed a petition for a rehearing of that motion. In view, however, of our conclusion upon the merits we will proceed as if the right to petition for a rehearing on the motion had not been waived by argument on the merits and also as if the petition for a rehearing would be granted notwithstanding the fact that, as it states, it is based on points which were not presented through inadvertence of counsel and not considered through no fault of the court, or as if the additional arguments now presented might properly be considered on the merits irrespective of the decision on the motion to quash.

The defendants contend that Judge Gear's decision on the motion for a new trial was not absolutely void but was at most merely erroneous or voidable inasmuch as he had jurisdiction of the parties and the cause and power to grant a motion for a new trial and power to order a new trial of his own motion, and that it cannot be said from the record that he did not grant the new trial of his own motion, and that the requirement of the bond was not jurisdictional because it could be waived and jurisdictional defects cannot be waived; that his decision, not being absolutely void, cannot be collaterally attacked; and that the present attack by writ of error to reverse Judge Lindsay's order is collateral as to Judge Gear's
130 decision because it is not a direct proceeding to reverse that decision and the time has expired for such a proceeding and

the fact that the attack is made in the same case does not make it direct. Also that Judge Lindsay's order merely supplements Judge Gear's decision and cannot be attacked unless Judge Gear's can be; that that order was not void because Judge Lindsay, as well as Judge Gear, could order a new trial of his own motion on the suggestion of the defendants, and that the motion for a formal order may be viewed as such a suggestion; and that since Judge Lindsay had the power to order a new trial his order could stand by itself and was at most merely voidable or erroneous and not void and hence was interlocutory and not reviewable at this stage on error. Also that Judge Gear's decision was not void or at least cannot be considered void in this proceeding by reason of his absence from the Territory or the expiration of his term of office.

It is unnecessary to say whether each or either of the circuit judges was absolutely without jurisdiction to order a new trial or whether the decision or order for a new trial was absolutely void so as to be subject to collateral attack. The word "jurisdiction" is somewhat elastic. It does not follow that because a defect can be waived the court has jurisdiction or that because it cannot be waived the court is absolutely without jurisdiction. To illustrate, there are cases in which a court of equity, for instance, might dismiss a bill for want of jurisdiction and even would do so of its own motion if it noticed the defect and yet if it should not do so and the question were not raised the decision would not be absolutely void. See *Kuala v. Kuapahi*, 15 Haw. 300, and cases there cited. Likewise, if this court did not have jurisdiction of reserved questions in equity a decision in such a case would not be void. *Brown v. Brown*, 15 Haw. 308. Similarly, an appellate court might properly dismiss an appeal for want of jurisdiction because the statutory requirements of an appeal have not been complied with, as when the appeal bond has
131 not been filed or the appeal noticed within the time prescribed, or because the appeal is from an opinion as distinguished from a judgment or decree, or because the judgment appealed from is of an interlocutory nature, and yet a decision in any such case, if the defect were not urged in due season, would not be void. See *Hind v. Wilder's S. S. Co.*, 14 Haw. 219, and cases there cited. As shown in the decision on the motion to quash, even those courts which hold that the want of an appeal bond is a jurisdictional defect which cannot be waived by the parties hold also that it cannot be taken advantage of after decision when it was not noticed before decision. In *Ferreira v. Honolulu R. T. & L. Co.*, 16 Haw. 797, in which, as in the present case, it was objected that the trial judge should not have entertained a motion for a new trial for want of a sufficient bond, this court said: "The requirement that a sufficient bond should be filed was jurisdictional. * * * A sufficient bond not having been filed the court below had no jurisdiction to entertain the motion for a new trial." In general jurisdiction over the subject matter cannot be conferred by waiver or consent. On the other hand there are cases in which a judgment would be absolutely void for want of jurisdiction, and yet in which the jurisdictional defect might have been waived, as, for instance, where the defect

consists in want of notice to the defendant. In the decision on the motion to quash we did not hold that the decision and the order for a new trial were absolutely void so as to be subject to collateral attack. We held merely that the trial court was without power to grant the motion for a new trial and that consequently the motion for a new trial should be regarded as a new proceeding, in which case the order granting the new trial would be a final order in that proceeding and therefore reviewable. This is the view taken by the cases there cited and other cases. See *Hume v. Bowie,* 148 U. S. 245; *Macfarland v. Brown,* 187 U. S. 244; *Deering v. Creighton,* 26 Ore. 556; *Killip v. Empire Mill Co.,* 2 Nev. 34, 42; *Tutman v. B. & O. R. R.,* 190 U. S. 38; *Manning v. Ger. Ins. Co.,* 117
132 Fed. 52. Although the jurisdictional defect might have been waived, as it might have been in the cases just cited, it was not waived.

It is conceded that the attack upon Judge Lindsay's order is direct since that order is made the direct subject of the writ of error and the writ was brought within the time prescribed by statute; also that the motion for a formal order presented to Judge Lindsay was not a motion for a new trial, and that such a motion could not have been made at that time because the time within which it could have been made had expired; also that Judge Lindsay's order cannot be regarded as a grant of the original motion for a new trial made before Judge Gear. It is equally clear to us that it cannot be regarded as made by Judge Lindsay of his own motion, for it was made in response to the defendant's motion, is entitled "Order granting defendants' motion for a new trial," and, after reciting that the defendants had made such a motion and that the court had duly considered it, concludes, "Said motion is granted; and, it is therefore and hereby ordered that in the above entitled action a new trial be had." Moreover, it was, in accordance with the motion, a mere formal order not made by the judge as an exercise of discretion. Even if it were made by the judge of his own motion and as an exercise of his discretion, it was made too late and at an improper time, for it was made in vacation and after the lapse of three terms after the term at which the verdict was rendered and judgment entered. Of course, if a motion were properly made in season it could be decided at a subsequent term, but we are now considering an order by the court *sua sponte.* Whether in this jurisdiction a trial judge could order a new trial of his own motion under any circumstances after the expiration of the ten days prescribed for moving for a new trial we need not say. We are not aware that that has ever been done. In England, under peculiar or extraordinary
circumstances in criminal cases, the court may order a new
133 trial of its own motion after the expiration of the time, namely, the first four days of the next term, during which a motion for a new trial may be made. In the United States in the absence of statute the general rule is that except under certain circumstances a court loses control over its judgments after the expiration of the term at which they are made. Statutes often limit the time for moving for a new trial to a short period after verdict or

judgment. New trials are seldom granted by a court of its own motion and then as a rule only under special circumstances and at the time of the verdict or soon afterwards. In the present case the order was made after the time for moving for a new trial, after the time limited for bringing the case up on exceptions or error, and after the third term following that in which the verdict was rendered and judgment entered—more than a year after judgment was entered.

It is suggested, however, by counsel that Judge Lindsay's order might be sustained not as one made of his own motion merely but as one that might properly be made or ought to be made by a successor to a judge who tried the case and who could not make the order by reason of the expiration of his term of office. The cases relied on are *Bass v. Swingley*, 42 Kans. 729 (22 Pac. 714); *Ohms v. The State*, 49 Wis. 415; *Woodfolk v. Tate*, 25 Mo. 597; *Wright v. Judge*, 41 Mich. 726. These cases, as well as many others including that of *Hume v. Bowie, supra*, show that when a party has right as, for instance, to have a motion for a new trial which has been presented within the prescribed time decided, or to have a bill of exceptions which has been presented within the prescribed time settled cannot be deprived of that right by the death or illness or expiration of the term of office of the judge who presided at the trial, and that if another or succeeding judge cannot perform those functions for want of a proper record upon which he can exercise a proper discretion a new trial should be ordered as a matter of course. These cases, however, have no application to the present case. The bond was not given within the prescribed time, and the defendants
134 therefore did not acquire a right to have the motion passed upon by the trial judge and consequently would not lose a right by reason of the expiration of the trial judge's term of office and the inability of his successor to pass upon that motion. Indeed, the reasons given in these cases for holding that a succeeding judge cannot pass on a motion for a new trial, namely, because of the discretionary character of that function and the want of a proper record, would, if they hold in this jurisdiction, prevent Judge Lindsay from granting a new trial of his own motion.

The only way in which Judge Lindsay's order can be regarded is that it was a formal order based upon or made in pursuance of Judge Gear's decision, like the entry of any other formal order, judgment or decree based upon or made in pursuance of an opinion, decision, judgment or verdict rendered. Such being the case, the order cannot be considered independently of the decision, and the writ in bringing up the order for review brings up also the decision, just as a writ of error that brings up any judgment brings up the opinion or decision on which the judgment was based. The attack upon Judge Gear's decision is therefore direct, for, being direct on Judge Lindsay's order, it is direct upon the decision on which that order depends.

Judge Gear's decision cannot be regarded as made of his own motion. It granted the defendants' motion for a new trial. The cablegram states: "Motion for new trial granted. Grounds mailed." The "grounds mailed" form the decision referred to. This states

that the defendants made the motion for a new trial, that this was argued and submitted, that there were two main questions raised in the brief and argument of the defendants; sets forth these; and then proceeds to consider at length the respective contentions made in the argument upon the motion and concludes that a new trial should be ordered. Even if the decision had been made by the judge of his own motion it could not stand for the reason already stated
135 why Judge Lindsay's order could not stand, namely, because it was made too late. It was not made until the latter part of the second term of court after the verdict was rendered and judgment entered—nine months after judgment was entered.

Sufficient has already been said in the decision on the motion to quash and in the present decision to show that Judge Gear's decision cannot stand as a decision granting the defendants' motion for a new trial.

It will be unnecessary to say whether Judge Gear's decision, if it could stand so far as the want of a bond on the motion for a new trial is concerned, could stand also notwithstanding that it was cabled or mailed from without the Territory and that the mailed decision did not arrive in the Territory and was not filed until after the expiration of the judge's term of office.

The order granting a new trial is reversed.

(Signed) W. F. FREAR.
(Signed) A. A. WILDER.
(Signed) J. T. DE BOLT.

E. C. Peters, Attorney General, for plaintiff.

S. H. Derby (Kinney, McClanahan & Cooper on the brief) for defendants.

Endorsed: Supreme Court Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. Decision. Filed April 9, 1906. George Lucas, Clerk.

136 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Supt. of Public Works of the Territory of Hawaii, Plaintiff and Plaintiff in Error,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Bros. & Co., Defendants and Defendants in Error.

The above matter having come duly on to be heard on a Writ of Error by the plaintiff herein to reverse the order in the Circuit Court of the First Circuit herein, filed July 18th 1905, granting the defendants a new trial, and argument having been had, and the Court having in its opinion filed herein on the 9th day of April 1906, decided that said order should be reversed;

Now therefore, it is hereby ordered and adjudged that the said order of new trial be and the same is hereby reversed.

Dated April 14, 1906.

By the Court:

(Signed) GEORGE LUCAS, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. Filed April 14, 1906 at 11:10 A. M. George Lucas, Clerk.

137 In the Supreme Court of the Territory of Hawaii, October, A. D. 1905, Term.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers and Company, Defendants.

Mandate.

Notice of Decision on Writ of Error.

To the Honorable the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

You are hereby notified that upon writ of error the Supreme Court of the Territory reversed the order granting the defendants a new trial in the above entitled cause.

Dated Honolulu this 14th day of April A. D. 1906.

By the Court:

(Signed) GEORGE LUCAS, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. October Term, 1905 April Session 1906. The Territory of Hawaii etc. Plaintiff *vs.* E. J. Cotton, *et al.* Defendants. Notice of Decision on Writ of Error. Filed April 14 1906 at 11:12 A M. George Lucas, Clerk.

138 *Record on Bill of Exceptions.*

138½ In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. A. HOLLOWAY, Superintendent of Public Works, Plaintiffs,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Copartners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Motion.

To the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Judicial Circuit:

Now come the defendants herein, by their attorneys Kinney, McClanahan & Cooper, and move this Honorable Court that they be allowed to amend their bill of exceptions herein filed on June 8, 1904, for the purpose *inter alia* of conforming the same to the present rules of the Supreme Court, and to make said bill of exceptions more specific as to the matters incorporated therein.

The amendments requested being in the following particulars

1. By incorporating in said bill of exceptions by reference, the transcript of testimony and exhibits in the above cause.

2. By incorporating therein by reference or otherwise the pleadings in said cause.

3. By incorporating therein plaintiff's requested instructions 12, 14 and 16, and the exceptions duly taken to the granting of
139 said instructions, and defendants' requested instructions 3, 7, 9, 10 and 11 and the exceptions duly taken by defendants to the refusal of said requested instructions.

4. By incorporating therein the exception taken to the striking out of certain evidence of the witness Marston Campbell as appears from pages 235 and 236 of the transcript of testimony.

Defendants further move that execution be stayed in the above cause pending the settlement of said amended bill of exceptions and the final decision thereof, and that the court now order a stay of execution pending the hearing and decision of this motion.

This motion is based on the record herein and on the affidavit of S. H. Derby, hereto attached and made a part hereof.

Dated, April 14th, 1906.

KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Let execution in the above cause be stayed pending the hearing and decision of the above motion.

ALEXANDER LINDSAY, JR.,
Second Judge First Circuit Court.

140 *Notice of Motion.*

To the Honorable E. C. Peters, Attorney General and counsel for the plaintiff herein:

Please take notice that we shall present the foregoing motion to the Honorable Alexander Lindsay, Jr., on the 17th day of April at 9 o'clock A. M., or as soon thereafter as counsel may be heard and ask that the same be allowed.

KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

141 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiffs,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Copartners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Affidavit of S. H. Derby.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

S. H. Derby being first duly sworn on oath deposes and says: That he is a member of the firm of Kinney, McClanahan & Cooper, attorneys for the defendants herein; that the bill of exceptions herein filed on June 8, 1904, was filed by the then counsel for the defendants herein for the purpose of preserving the rights of the defendants herein in view of the objection raised by the plaintiff in regard to the failure of defendants to file a bond on their motion for a new trial; that it was for this purpose prepared hurriedly and of necessity left out the specific rulings of the court except that in regard to the verdict, and merely covered the same generally; that defendants have not further perfected said bill of exceptions owing to the decision of the Honorable George D. Gear, and the order of the Honorable Alexander Lindsay, Jr., granting defendants a new trial; that said rulings were reversed on the 9th day of April A. D. 1906; that the purpose of the present motion is to
142 put in a complete and more perfect bill, stating certain exceptions which are now incorporated in said bill in an incomplete state; that affiant believes that defendant have a right to go to the Supreme Court of this Territory on the bill of exceptions referred to; that the perfecting of that bill is not sought for purposes of delay, but in order to present the question raised thereby to the Supreme Court of the Territory of Hawaii; that defendants further intend to appeal the above cause to the Supreme

Court of the United States, and cannot do so until there is a final judgment herein on said bill of exceptions; that the Honorable E. C. Peters, Attorney General, in response to a question by affiant, informed affiant that he purposed taking out execution on the judgment herein at once irrespective of the fact that said bill of exceptions was still pending, and of the further fact that defendants intended to appeal to the Supreme Court of the United States; that affiant believes great injustice would be done if said execution were so taken out, and that a stay of execution is absolutely necessary to preserve whatever rights defendants may still have in the cause.

And further affiant sayeth not.

(Signed) S. H. DERBY.

Subscribed and sworn to before me this 9th day of April, A. D. 1906.

GUSSIE H. CLARK,

[SEAL.] *Notary Public, First Judicial Circuit.*

Endorsed: Law No. —. Circuit Court, First Circuit, Territory of Hawaii. Territory of Hawaii, Plaintiff *vs.* Cotton Bros. & Co. Defendants. Motion. —— ——, Judge. Filed April 14, 1906, at 11:14 A. M. George Lucas, Clerk. Kinney, McClanahan & Cooper 303-305 Judd Bldg. Honolulu Attorneys for ——. (Office No. —.)

143 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiffs.

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Copartners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Affidavit of George D. Gear.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

George D. Gear being first duly sworn, on oath, deposes and says: that he was, in the month of June, A. D. 1904, the second Judge of the Circuit Court of the First Circuit, and so continued for some time thereafter; that defendants' Bill of Exceptions, in the above cause, which was pending before him, as such judge, was duly presented to him by A. S. Hartwell, Esq., then the attorney for the defendants herein, and before said A. S. Hartwell, Esq., was appointed a justice of the Supreme Court of the Territory of Hawaii.

GEORGE D. GEAR.

Subscribed and sworn to before me this 16th day of April, A. D. 1906.

P. SILVA,
[SEAL.] *Notary Public, First Judicial Circuit.*

Endorsed: Law No. —. Circuit Court, First Circuit. Territory of Hawaii, Plaintiff, *vs.* Cotton Bros. & Co. Defendants. Affidavit of George D. Gear. —— ——, Judge. Filed April 17th, 1906 at — A. M. Wm. R. Sims, Clerk. Kinney McClanahan & Cooper 303-305 Judd Bldg. Honolulu Attorneys for ——. (Office No. —.)

144 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Order Extending Time to File Bill of Exceptions.

Good cause appearing therefor and pursuant to an oral order made in open court this 17th day of April A. D. 1906, it is hereby ordered that if the defendants herein have now any right to file and present any further or other bill of exceptions herein their time for so doing be and the same hereby is extended until 10 days from the date hereof.

Dated, April 17, 1906.

ALEXANDER LINDSAY, JR.,
Second Judge of the Circuit Court of the First Circuit.

Endorsed: Law — Circuit Court First Circuit. Territory of Hawaii. Territory of Hawaii, Plaintiff *vs.* Cotton Bros. & Co. defendants. Order extending time for Bill of Exceptions. —— —— Judge. Filed April 17, 1906 at 1:45 P. M. J. A. Thompson, Clerk. Kinney, McClanahan & Cooper 303-305 Judd Bldg. Honolulu. Attorneys for —— —— (Office No. —)

145 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Exception.

Comes now the Territory of Hawaii, the plaintiff above named, and excepts to the order this day made extending until ten days from this date the time within which the defendants may file and present any further or other bill of exceptions in the above entitled action.

Dated Honolulu, April 17th, A. D. 1906.

THE TERRITORY OF HAWAII, ETC.,
Plaintiff Above Named.
By FRED W. MILVERTON.

Endorsed: Circuit Court 1st Circuit Territory of Hawaii. Territory of Hawaii by C. S. Holloway etc. *vs.* Cotton Bros. & Co. Exception. Filed April 17, 1906. George Lucas, Clerk. Fred W. Milverton Deputy Attorney General for Plaintiff.

146 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Motion to Dismiss Defendants' Pretended Bill of Exceptions Filed June 8th, 1904.

Now comes the plaintiff in the above entitled action, by E. C. Peters, Attorney General of the Territory of Hawaii, and moves this Honorable Court that the purported and pretended defendants' Bill of Exceptions herein, heretofore and on to-wit the eighth day of January, A. D. 1904, filed in the above entitled cause and court, be dismissed upon the grounds following, to-wit:

1.

That the said purported and pretended Bill of Exceptions is not signed by the defendants herein, nor by anyone on their behalf.

2.

That said purported and pretended Bill of Exceptions was not, within twenty days after final judgment herein, presented to the Honorable George D. Gear, the then Second Judge of the above entitled court, and the trial judge of the within cause, for allowance and signature, no other or further or additional time beyond the statutory time having been allowed said defendants within which to present said purported and pretended Bill of Exceptions for
147 allowance and signature, by said Judge.

3.

That said purported and pretended Bill of Exceptions was not presented to the trial Judge of the within cause for allowance and signature by him within the time required by law.

This motion is based upon the record herein and particularly the notice of A. S. Hartwell, Esq., the then Attorney for defendants, to E. C. Peters, Esq., then Deputy Attorney General, of date the 8th day of June, A. D. 1904, notifying said Deputy Attorney General that the said A. S. Hartwell, Esq., had, upon the date thereof, filed in the First Circuit Court the defendants' Bill of Exceptions, as also all proceedings had herein and the affidavit of E. C. Peters hereunto attached and made a part hereof, and oral evidence which plaintiff prays to be permitted to introduce and submit upon the hearing of the foregoing motion.

Dated, Honolulu, April 23rd, A. D. 1906.

E. C. PETERS,
Attorney General.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

E. C. Peters being first duly sworn on oath deposes and says: That he is informed and believes, and upon such information and belief alleges it to be the fact, that a certain purported and pretended Bill of Exceptions of defendants herein, filed in the above entitled court and cause on the 8th day of June, A. D. 1904, was, on the said 8th day of June, filed with M. T. Simonton, Esq., one of the clerks of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, and placed of record in the above entitled court and cause, but said purported and pretended Bill of Exceptions was
148 never by the defendants herein, nor by any one on their behalf, presented to the trial judge, to-wit: the Honorable George D. Gear, for his allowance and signature within the time required by law.

And further affiant sayeth not.

E. C. PETERS.

Subscribed and sworn to before me this 23rd day of April, A. D. 1906.

[SEAL.] JNO. M. KEA,
Notary Public First Judicial Circuit,
Territory of Hawaii.

Endorsed: Circuit Court First Circuit Territory of Hawaii. Territory of Hawaii, etc. Plaintiff *vs.* E. J. Cotton *et al.* Defendants. Motion to Dismiss Defendants' Pretended Bill of Exceptions filed June 8th 1904. Service of a copy of the within motion this day admitted. Dated Honolulu April 23rd 1906 Kinney McClanahan & Cooper Attorneys for Defts. Filed April 23, 1906. George Lucas, Clerk. E. C. Peters Att'y Gen'l and F. W. Milverton, 3rd Dep. Att'y Gen'l For Pl'ff.

149 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Notice.

To E. C. Peters, Attorney General, counsel for the plaintiff herein:

Please take*n* notice that when defendants' motion to amend its bill of exceptions herein comes up for hearing on Tuesday April 24th, A. D. 1906, at 9 A. M. we shall ask leave to amend said motion by inserting therein a request to further amend said bill of exceptions by adding the signature of counsel for defendants thereto in behalf of said defendants.

Dated April 23rd, 1906.

KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Endorsed: Law. No. — Circuit Court, First Circuit Territory of Hawaii. Territory of Hawaii, Plaintiff *vs.* Cotton Bros. & Co., Defendants. Notice *re* Amendment, —— —— Judge. Filed Apr. 23rd 1906 at 2:20 P. M. Sims Clerk; Kinney, McClanahan & Cooper 303-305 Judd Bldg. Honolulu. Attorneys for —— —— (Office No. —)

150 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

ISLAND & COUNTY OF OAHU, *Territory of Hawaii, ss:*

Fred W. Milverton, being first duly sworn deposes and says: That he is now and has been, since the first day of December, A. D. 1905, a Deputy Attorney General of the Territory of Hawaii; that on the morning of the 16th day of April, A. D. 1906, affiant was served by the Attorneys of the defendants in the above entitled cause with a copy of the affidavit of George D. Gear filed in the above entitled court and cause on the 17th day of April, A. D. 1906; that thereafter and on to-wit the said 17th day of April, A. D. 1906, affiant inquired of the said George D. Gear as to the date upon which the so called Bills of Exceptions of the defendants in the above entitled cause was presented to the said George D. Gear for allowance and signature by A. S. Hartwell, Esq., Attorney for said defendants, and the said George D. Gear then informed affiant that he was unable to state the date upon which said Bill of Exceptions was presented to him for allowance and signature and was unable to state whether or not the said Bill of Exceptions was presented to him within the time required by law for allowance of same, but that he, the said George D. Gear, did remember that the said defend-

151 ants' bill of exceptions was presented to him by the said A. S. Hartwell, Esq., some time before the said A. S. Hartwell, Esq., became a member of the Supreme Court of the Territory of Hawaii.

Affiant further states upon information and belief, that the said A. S. Hartwell, Esq., was appointed a Justice of the Supreme Court of the Territory of Hawaii on the 12th day of December, A. D. 1904, and took the oath of office on the 3rd day of January, A. D. 1905.

FRED W. MILVERTON.

Subscribed and sworn to before me this 24th day of April, A. D. 1906.

[SEAL.] JNO. M. KEA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Endorsed: Circuit Court First Circuit Territory of Hawaii. Territory of Hawaii, etc. Plaintiff *vs.* E. J. Cotton *et al.* Defendants. Affidavit of F. W. Milverton. Filed Apr. 24, 1906 at 9:30 A. M. Sims, Clerk. E. C. Peters, Att'y Gen'l and F. W. Milverton, 3rd Dep. Att'y Gen'l for Pl'ff.

152 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiffs,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Affidavit of Alfred S. Hartwell.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Alfred S. Hartwell, on oath depose and say: That on receipt of a cablegram from Attorney General Knox on June 15, 1904, informing me that I was commissioned Associate Justice of the Supreme Court of the Territory and requesting me to qualify immediately, I thereupon, upon the same day, took the oath of office and entered upon its duties and then and thereafter ceased to be the attorney of the above named defendants, transferring the case to William A. Kinney; and that, according to my best recollection, I presented to Judge Gear, a Judge of the First Circuit, at his office, a bill of exceptions in behalf of the defendants and filed the same June 8, 1904, the day the said bill is marked as filed, at the same time informing the Judge that I filed the bill of Exceptions to save all rights pending the defendants' motion for a new trial; that I did not sign the bill of exceptions and I never signed a bill of ex-
153 ceptions in my life, no statute in this jurisdiction having required an attorney to do so.

ALFRED S. HARTWELL.

Subscribed and sworn to before me this 24th day of April, A. D. 1906.

WM. R. SIMS,
Clerk Circuit Court, First Judicial Circuit.

Endorsed: Law No. —. Circuit Court First Circuit Territory of Hawaii. Territory of Hawaii, Plaintiff *vs.* Cotton Bros. & Co. Defendants. Affidavit of Alfred S. Hartwell, —— —— Judge. Filed May 24th 1906, at 3 P. M. Wm. R. Sims, Clerk. Kinney, McClanahan & Cooper 303-305 Judd Bldg. Honolulu. Attorneys for —— —— (Office No. —).

154 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the firm name of Cotton Brothers & Company, Defendants.

Defendants' Amended Bill of Exceptions.

(Amending Original Bill of June 8th, 1904.)

The plaintiff brought its action on the case against the defendants, claiming $25,000 damages for the loss of a certain dredger hired by the defendants of the plaintiff and lost as alleged by the plaintiff by reason of the negligence and improper care of the defendants.

The said cause coming on to trial at the April 1904 term of the Circuit Court of the First Circuit before a jury the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit presiding, and the parties being at issue and evidence having been adduced both by the plaintiff and defendants and the Court having instructed the jury on the law, the jury retired to consider its verdict, and thereafter, to wit, on May 27th A. D. 1904, rendered a verdict in court in the sum of $25,000 for the plaintiff.

Exception 1.

155 At the time of the rendition of said verdict, to wit, May 27th, 1904, the defendants excepted to the said verdict as being contrary to the law and the evidence.

Exception 2.

That upon the trial of said cause one Marston Campbell was called as a witness by the defendants and at the conclusion of his evidence the following motion to strike was made by the plaintiff.

"Mr. PETERS: Now, if the Court please, I move to strike out the questions and answers of Marston Campbell regarding the sinking of the stern of eight inches and four inches respectively. I also ask that the evidence of Marston Campbell be stricken out referring to the hypothetical question, which presupposes the condition of the government dredge at the time she was sunk in the same condition as she was when Marston Campbell saw her down there at the time he testified to, prior to the time she was taken to Pearl Harbor, and prior to the time that the new ladder was put on her; in fact, all the questions and answers regarding this hypothetical question put to Marston Campbell be stricken out on the ground that the questions as asked Marston Campbell were not established by the evidence; that the words "government dredge" used in the more

lengthy hypothetical question does not now appear to be the same government dredge in exactly the same condition as to appliances and appurtenances (as was?) out at Pearl Harbor; and on the further ground that the question regarding displacements and weights, the talk about the sinking of the hull in the water, assumed facts not in evidence or proved in this case, or facts assumed to have been proved."

(Transcript, pp. 235-236.)

which motion the Court granted to which ruling granting said motion to strike the defendants duly excepted.

Exception 3.

That before the cause was given to the jury defendants requested the following instruction:

Defendants' requested Instruction No. 3.

"This agreement allowed the defendants 'the use of the government suction dredger' without confining the place of use to any particular locality. Using the dredger for dredging out the entrance of Pearl Harbor may be presumed to have been contemplated by both parties, consequently the defendants are not chargeable
156 with negligence by the mere fact of using the dredger at that place, whether the plaintiff expressly agreed that it might be used there or not."

"If the plaintiff agreed or consented to the use of the dredger at Pearl Harbor that is an additional reason why it cannot complain of such use."

Which instruction the Court refused to give as requested and between the words "not" and "chargeable" inserted the word "necessarily," to which modification by the Court the defendants duly excepted.

Exception 4.

The defendants further requested the following instruction:

Defendants' requested Instruction No. 7.

"It was not defendants' fault if the dredger was not strong enough to be used in dredging at Pearl Harbor, and if its loss was owing to its not having requisite strength for that use the defendants are not liable and are entitled to a verdict in their favor."

Which instruction the Court refused to give in the form requested but added after the word "use" the following words "which facts defendants did not know nor have such means of knowing as would put a reasonably cautious and prudent owner upon inquiry," to which modification of said instruction defendants duly excepted.

Exception 5.

That defendants further asked the following instruction:

Defendants' requested Instruction No. 9.

"In regard to the value of the dredge the jury may consider the

fact that the dredge could be replaced by a new and more efficient dredge and also the fact that part of the dredge property returned is valued at $10,800."

Which instruction the Court refused to give, to which ruling defendants duly excepted.

Exception 6.

That defendants further requested the following instruction.

Defendants' requested Instruction No. 10.

157 "There is no evidence tending to show that the first moorings or the re-moorings were not such as experienced men would use for securing the dredger, in the position in which she lay."

Which instruction the Court refused to give, to which ruling defendants duly excepted.

Exception 7.

That defendants further requested the following instruction.

Defendants' requested Instruction No. 11.

"No presumption in the absence of evidence if there is no such evidence can be made that the engineer or other men employed on the dredge were not efficient or capable men for the work in which they were employed, or that they failed to perform their duty faithfully. This is a question of fact to be determined by the jury and if there is such evidence."

Which instruction the court refused to give, to which ruling defendants duly excepted.

Exception 8.

That before the submission of the case to the jury the plaintiff requested that the following instruction be given:

Plaintiff's requested Instruction No. 12:

"In determining the question of whether or not defendants were negligent in their care of the dredger, you should take into consideration all the facts and circumstances of the case, the character of the dredger, her seagoing qualities, the place where she was being used when lost and the men who had her in charge at the time of her loss, and if you find by a preponderance of evidence that the placing of the scow upon the bar of the entrance of the channel leading to the mouth of Pearl Harbor was not such an act as an ordinary careful and prudent man would exercise as to his own property under similar circumstances, then I charge you, Gentlemen of the jury, that the defendants were guilty of negligence in placing the dredger in that position."

Which instruction the Court gave, to which ruling of the Court granting said instruction the defendants duly excepted.

Exception 9.

The Plaintiff further requested the following instruction:

Plaintiff's requested Instruction No. 14.

158 "One of the defenses in this case, Gentlemen, is one of inevitable accident, in other words the loss of the dredger was occasioned by a cause not of human origin and not controllable by human power. But in order that the approximate cause of the loss be considered inevitable accident it is not enough to show that under circumstances existing at the time of the accident it could not have been avoided. It must also be the fact that the defendants were not guilty of any negligence which brought about any of those circumstances. For if you find by the preponderance of the evidence that the defendants, by previous negligence on their part, put the property of the plaintiff into circumstances of such difficulty or peril as to make it impossible for them to save that property under those circumstances, then the proximate cause of the loss is not inevitable accident but the negligence of the defendants, and the defendants are liable for the loss."

Which instruction the Court gave, to which ruling granting said instruction the defendants duly excepted.

* * * * * * *

The following papers in the cause are hereby referred to and made a part of this bill of exceptions:

Plaintiff's complaint, Defendants' answer; Transcript of te-timony of official stenographer filed herein;

Plaintiff's Exhibit A, being an agreement between the Superintendent of Public Works and the Defendants;

Plaintiff's Exhibit B being indenture between Risdon Iron and Locomotive Works and the Department of the Interior of the Hawaiian Government;

Plaintiff's Exhibit "C" inventory of the Dredger;

Plaintiff's Exhibit "D" map of Pearl Harbor channel;

Plaintiff's Exhibit "E" plan of the Dredger;

Plaintiff's Exhibit "F" further plan of the Dredger;

Defendants' Exhibit 1, Map of Pearl Harbor;

Defendants' Exhibit 2, Letter from Public Works Department receipting for part of the Dredger;

Defendant's Exhibit 3, similar letter;

Defendants' Exhibit 4, Letter from Department of Public Works; dated May 2, 1902;

Defendants' Exhibit 5, Diagram;

159 Defendants' Exhibit 6, Synopsis of dredge materials returned.

The instructions given by the Court as shown by the record herein; Stipulation for amendment of complaint, dated June 8, 1903; Motion for a new trial, dated May 31, 1904; Defendants' further notice of motion for a new trial, dated June 7, 1904; Judgment filed June 8, 1904; Defendants' motion for extension of time to file further bill of exceptions filed June 9, 1904, order granting said motion, filed

June 9, 1904; Stipulation filed June 23, 1904; Stipulation *re* further bill of exceptions filed July 18, 1904; Decision of Judge Gear filed March 4, 1905; Motion for formal order of new trial filed April 14, 1905; order granting new trial, filed July 18, 1905; Defendants' bill of exceptions filed June 8th, 1904; Motion to amend said bill of exceptions; Notice *re* further amendment of same; Affidavits of G. D. Gear and A. S. Hartwell in support of said motion to amend; Clerk's minutes on hearing of motion to amend and in cause generally.

Wherefore defendants pray that the foregoing amended bill of exceptions be settled and allowed.

Dated, April 30th 1906, as of April 1904 term.

(Signed) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

The foregoing bill of exceptions being found conformable to the truth is hereby allowed this 3rd day of May A. D. 1906 as of the April Term A. D. 1904.

(Signed) ALEXANDER LINDSAY, Jr.,
Second Judge of the Circuit Court of the First Circuit,
Successor of Judge Presiding at Trial of Cause.

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. Territory of Hawaii, Plaintiff *vs.* Cotton Bros. & Co. Defendants. Def'ts' Amended Bill of Exceptions —— Judge. Presented to me this 30th day of April, 1906. Lindsay 2nd Judge. Filed Apr. 30th, 1906 at 2 P. M. Wm. R. Sims, Clerk. Kinney, McClana-
160 han & Cooper 303-305 Judd B'ld'g Honolulu. Attorneys for ——. (Office No. —.)

161 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,
vs.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Case.

Notice.

To E. C. Peters, Attorney General, attorney for plaintiff herein:

Please take notice that we have this day filed the defendants' amended bill of exceptions in the above cause and presented the same to the Honorable Alexander Lindsay, Second Judge of the Circuit Court of the First Circuit, and that we shall ask the court on Thursday the 3rd day of May, 1906, at 9 A. M. or as soon thereafter

as counsel may be heard, that said amended bill be signed and allowed.

KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Dated April 30, 1906.

Endorsed: Law No. —. Circuit Court, First Circuit. Territory of Hawaii. Territory of Hawaii, Plaintiff, *v.* Cotton Bros. & Co., Defendants. Notice. ——, Judge. Filed Apr. 30, 1906, at 2 P. M. Wm. R. Sims, Clerk. Kinney, McClanahan & Cooper, 303-305 Judd Bldg., Honolulu, Attorneys for ——.

162 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Plaintiff's Exceptions and Objections to the Defendants' Amended Bill of Exceptions Amending Original Bill of Exceptions of June 8th, 1904.

Now comes the Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the said Territory, and excepts and objects to a consideration by this Court of the defendants' amended Bill of Exceptions amending the original Bill of Exceptions of June 8th, 1904, on the grounds:

I.

That said Bill of Exceptions was filed in the Clerk's office on the 8th day of June, 1904, and was not on said day, or at all, presented to the trial judge of the above entitled cause within the time required by law.

II.

That said Bill of Exceptions filed on the 8th day of June, 1904, was never signed by defendants, or either of them or any one one on their behalf.

III.

That said Bill of Exceptions filed on the 8th day of June, 1904, did not contain any valid, legal or proper exceptions.

163 IV.

That the alleged first exception is not a legal, valid or proper exception.

V.

That said alleged Exception 2 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

VI.

That said alleged Exception 3 was not incorporated in nor made a part or, nor alleged as an Exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

VII.

That said alleged Exception 4 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

VIII.

That said alleged Exception 5 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

IX.

That said alleged Exception 6 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

X.

That said alleged Exception 7 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

XI.

That said alleged Exception 8 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

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XII.

That said alleged Exception 9 was not incorporated in nor made a part of, nor alleged as an exception of defendants in said defendants' Bill of Exceptions of June 8th, 1904.

Wherefore, plaintiff prays that the said alleged exceptions 1 and 2 and 3 and 4 and 5 and 6 and 7 and 8 and 9 be disallowed.

Dated Honolulu, this 3rd day of May, A. D. 1906.

E. C. PETERS,
Attorney General for Plaintiff.

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. April Term, A. D. 1906. The Territory of Hawaii, etc., Plaintiff, *vs.* Cotton Bros. & Co., Defendants. Exceptions and Objections to Bill of Exceptions. Filed May 3rd, 1906, at 1:30 p. m. Sims, Clerk. E. C. Peters, Att'y Gen'l, and F. W. Milverton, 3rd Dep. Att'y Gen'l. For Plaintiff.

165 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Copartners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Stipulation and Order.

It is hereby stipulated and agreed by and between the parties to the above cause that the Record of the Cause made and used on the proceedings by way of Writ of Error between the parties hereto in the Supreme Court of the Territory of Hawaii (beginning with plaintiff's complaint and ending with hearing on the motion to settle plaintiff's bill of exceptions) may be used on the hearing of defendants' amended bill of exceptions with the same force and effect as if a new certified copy of the record of said proceedings were now made up, and that defendants need only prepare a record of the proceedings before the Circuit Court of the First Circuit subsequent to the decision on the aforesaid writ of error.

166 Provided, however, that defendants may have prepared and filed a certified copy of Plaintiff's Requested Instructions, not included in the first record of proceedings aforesaid.

TERRITORY OF HAWAII,
By E. C. PETERS,
Attorney General, Without Prejudice to Any and All Rights of the Territory of Hawaii.
COTTON BROTHERS & CO.,
By KINNEY, McCLANAHAN & DERBY,
Their Attorneys.

Endorsed: Law No. —. Circuit Court, First Circuit, Territory of Hawaii. Territory of Hawaii, Plaintiff, *vs.* Cotton Bros. & Co., Defendants. Stipulation and Order. —— ——, Judge. Filed May 15, 1906, at 3:20 p. m. J. A. Thompson, Clerk. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for Def'ts. (Office No. —.)

167 Circuit Court, First Circuit, Territory of Hawaii, April Term, 1906.

TERRITORY OF HAWAII, by Supt. Public Works,
vs.
COTTON BROS. AND CO.

Before Hon. A. Lindsay, Jr., Second Judge.

Clerk's Minutes.

April 17th, 1906, 9 A. M.

Hearing on Motion to Amend Bill of Exceptions.

F. W. Milverton, Esq. appearing as Deputy Attorney General for Complainants.

W. A. Kinney and S. H. Derby, Esqrs., for Defendants.

Mr. Milverton presents Motion for a continuance, which is granted for one week, after argument.

Following discussion by counsel, upon defendants' right to file the amended Bill etc., the Court, on motion of S. H. Derby Esq., grants defendant- 10 days further time in which to present and file an amended Bill of Exceptions, provided it be determined that defendants' right so to do, exists.

Mr. Milverton excepts to grant of 10 days further time on the ground that stipulation on file in the record as to extension of time, refers to 10 days subsequent to decision on motion for a new trial herein and not to the matter before the Court.

Counsel for defendant- comment upon the exception taken by the Attorney General, which result that the Court revokes its order granting a continuance and will now hear argument.

168 Mr. Milverton excepts.

After further discussion, Mr. Milverton again presents Motion for continuance, which it is ordered granted for one week.

Mr. Kinney excepts.

April 24th, 1906, 9:15 A. M.

E. C. Peters, Attorney General appearing for Plaintiff.

Messrs. Kinney and Derby for Defendants.

After remarks about affidavit of F. W. Milverton, Mr. Peters gives notice to counsel that he will present Motion to Dismiss Bill of Exceptions filed June 8th, 1904, at 9 A. M. April 25, 1906, to which time the case stands continued.

April 25th, 1906, 1:30 P. M.

Attorney General E. C. Peters, and S. H. Derby appearing for respective parties.

Continuance ordered till 10:30 A. M. April 26th, 1906.

Later in session. Mr. Derby appears alone and moves for order granting defendant- till tomorrow P. M. for filing further Bill of Exceptions, subject to the right to do so, stating that he had notified the Attorney General of his intention to request such further time.

Whereupon the Court grants Motion.

April 26th, 1906, 2 P. M.

Messrs. Peters and Milverton of Attorney General's Dep't appearing for Plaintiff.

Messrs. Kinney and Derby for Defendant-.

The Court denies Motion of the Attorney General to set aside its order extending time in which to file further Bill of Exceptions.

169 Mr. Peters formally excepts to the ruling of the Court, granting the said extension of time and thereupon presents motion to Dismiss the Defendants' Bill of Exceptions. Mr. Derby states that the motion to amend Defendants' Bill of Exceptions was filed prior to the Plaintiff's Motion to Dismiss and should therefore take precedence. After further remarks by counsel the Court rules that it will first take up Defendants' Motion to Amend.

Mr. Peters excepts.

Upon proffer of testimony the Court rules that it does not require evidence bearing on the motion.

Mr. Peters excepts.

Mr. Derby presents and reads Defendants' Motion to amend Bill of Exceptions.

The Court allows amendment of Defendants' Motion to Amend the Bill of Exceptions by adding signature of counsel thereto on motion of Mr. Derby.

Exception by Mr. Peters.

The Court declines to send for Justice Hartwell to come into Court for the purpose of being cross-examined by the Attorney General in this case.

Mr. Peters excepts to the court's refusal so to do, and calls as witnesses

George Lucas, sworn.

Judge Geo. D. Gear, Mr. Peters waives swearing of the Judge.

M. T. Simonton, sworn.

General Hartwell, takes the witness stand at request of Defendants' counsel.

Mr. Peters objects. Overruled.

General Hartwell, sworn by the Court.

Letter dated June 29th, 1904 from Disbursing Clerk at Washington, D. C. produced by witness.

170 Chief Justice W. F. Frear called by Defendant. Administration of oath waived.

Mr. Derby moves for one day's time after Court's decision upon the right of Defendant- to file an amended Bill of Exceptions in which to present and file same.

Court grants motion.

Exception by Mr. Peters.

4:15 P. M. Continuance ordered till 10:30 A. M. Apr. 27, 1906.

Friday, April 27, 1906, 10:40 A. M.

Attorney General Peters and Deputy Milverton appearing for plaintiff.

S. H. Derby Esq., appearing for Defendant-.

Mr. Derby argues in support of Motion to Amend Defendants' Bill of Exceptions.

Mr. Peters argues contra.

Continuance till Saturday April 28th, 1906 9 A. M.

Saturday, April 28th, 1906, 9 A. M.

Attorney General Peters, Deputy Milverton and S. H. Derby appear as Counsel for respective parties, and

Conclude argument.

The Court grants Defendants' Motion to Amend Bill of Exceptions.

Mr. Peters excepts.

Mr. Peters asks till and including Tuesday, May 1st, 1906 to file amended Bill of Exceptions.

Mr. Peters objects. Overruled.

And Court orders defendants granted till and including Tuesday May 1st, 1906 to file the amended Bill.

Exception by Mr. Peters.

171 The Court denies Plaintiff's Motion to Dismiss Defendants' Bill of Exceptions.

Mr. Peters excepts.

Adjournment.

Thursday, May 3rd, 1906, 1:30 P. M.

S. H. Derby, Esq., presents Defendants' Amended Bill of Exceptions.

Attorney General Peters presents objections, and exceptions to said Amended Bill.

Court overrules objections and exceptions, and allows defendants' Amended Bill of Exceptions.

Mr. Peters excepts.

Mr. Peters asks that he be allowed three days in which to prepare and present motion, *re* Execution, before sending of record up to the Supreme Court.

The Court allows Counsel till Tuesday, 9:30 A. M. May 8, 1906.

Tuesday, May 8th, 1906, 9 A. M.

The Court, on motion of Attorney General allows counsel till to-morrow in which to present motion *re* execution.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

I hereby certify that the foregoing is a full, true and correct copy of Clerk's Minutes in the matter of Defendants' Amended Bill of Exceptions in case of Territory of Hawaii, by Supt. Public Works *vs.* Cotton Bros. & Co.

Witness my hand and Seal of the Circuit Court of the First Circuit, at Honolulu, Island of Oahu, this 11th day of May, A. D. 1906.

(Signed) WM. R. SIMS,
[SEAL.] *Clerk Circuit Court First Circuit.*

Endorsed: Circuit Court First Circuit Territory of Hawaii. Apr. Term, 1906. Territory of Hawaii by Supt. Public Works *vs.* Cotton Bros & Co. Certified Copy of Clerk's Minutes *re* amended Bill of Exceptions. Filed May 12th, 1906 Sims, Clerk.

172 In the Circuit Court of the First Judicial Circuit, Island of Hawaii.

TERRITORY OF HAWAII
v.
COTTON BROTHERS ET AL.

Tuesday, April 24th, 1906, 9:15 o'clock A. M.

Mr. PETERS: I take it that Mr. Milverton's sworn document can be considered at this time and his signature subsequently placed upon it, and I am perfectly willing to go ahead and file it at this time.

Mr. DEBRY: I will agree that Mr. Milverton will swear that the contents of that document are true.

The COURT: I will reserve my ruling until tomorrow morning.

Mr. PETERS: I give notice to counsel now in open Court that I will present to your Honor at nine o'clock a motion to dismiss the bill of exceptions filed on the 8th day of June 1904.

Mr. DEBRY: There is one fact that I wish to call to the attention of the court, that is the bill of exceptions is not signed, and I filed a further request to be allowed to insert the signature of counsel and present that at the same time.

Tuesday, April 26th, 1906, 2 o'clock p. m.

Mr. PETERS: I understand that yesterday while I was ab-
173 sent from the court room counsel for respondents in this case requested your Honor to give them further time, I believe until to-day within which to file a further bill of exceptions in this case, is that the fact?

The COURT: If they had the right.

Mr. PETERS: Now I move to vacate and set aside that order on the ground that no motion, no proper motion, as prescribed by the rules of the Circuit Court of this Circuit, was prepared in that affidavit; and on the further ground that an oral motion was made in the absence of counsel for the plaintiff in this case; and on the further ground that the matter had already come before your Honor, a motion of like character suggested to the Court, to which counsel for the plaintiff, duly then and there excepted, that the Court at that time said he would take up the motion at another time and duly continued the entire matter until the following day at half past ten o'clock, therefore the order of the Court was improper for the reasons already stated.

The COURT: I understand that the matter of extending the time for the bill of exceptions is a matter entirely within the Court's discretion.

Mr. PETERS: I want a ruling on my motion.

The COURT: Motion is denied.

Mr. PETERS: We note an exception.

Allowed.

Mr. PETERS: We further take exception——

174 Mr. DERBY: I would like to have it appear to this last statement of Mr. Peters', as I stated in Court yesterday, that I had informed Mr. Peters that I would immediately come in and ask the Court for further time, and that Mr. Peters, out in the hallway there, said he would not be present.

Mr. PETERS: That is not the proposition as it transpired, I said that I would not be present; inasmuch as the order your Honor made yesterday was made in the absence of counsel for the plaintiff, without proper notice, improperly made, on the grounds already stated, we take exception to the allowance of your Honor's order allowing further time to respondents in this case, within which to file the bill of exceptions.

The COURT: Exception allowed.

Mr. PETERS: Now if the Court please, I desire to present a motion to your Honor to dismiss defendant's pretended and purported bill of exceptions filed June 8th, 1904 which was filed as of record in this case on the 23rd day of April A. D. 1906 and of which oral motion was given the day before yesterday at the hour of quarter to ten in the morning that that motion would be presented and a further notice of a motion that that motion would be presented yesterday at the hour of nine o'clock in the morning, which was served upon counsel for respondents in this case within twenty-four hours prior thereto.

Mr. DERBY: I would like to say that our motion to amend the bill of exceptions was filed before this motion was made to dismiss, and if some of those amendments are allowed, to which signature of counsel appear, then one of the objections at least to the

175 motion to dismiss will be untenable, it seems to me the whole matter—it would be fair and just to consider the whole matter together, and get the Court's view of the whole matter in-

stead of a partial view. So long as the motion is going to be taken up it would make no practical difference, and will save time to have this whole matter threshed out together; it seems to me that can be done very easily.

Mr. PETERS: I desire to call your Honor's attention, and have it appear on the record——

Mr. KINNEY: Wait a minute——

Mr. DERBY: As I stated to the Court, it seems to me perfectly reasonable that should be taken, and it has precedence over the whole matter, but if the whole matter can be considered together we are willing to have it——

Mr. PETERS: Have it appear on the record that the pretended and purported bill of exceptions filed the 8th day of June 1904 is not signed——

The COURT: Where is that motion?

Mr. DERBY: It seems to me, there is a motion to be made—it has a mere formal effect, the amendment can be allowed simply for the asking of it, and should be allowed simply asking for it, and I give notice that we be allowed to give the motion—you (To Mr. Peters) served your motion to dismiss so quickly we did not have any time to file our motion to amend——

Mr. PETERS: I object to the motion filed the 23rd day of
176 April 1906 on the ground it is not a motion based on the record, and no affidavit in support thereof, and Tuesday the twenty fourth day of April 1906 at Nine o'clock a. m. has passed.

Mr. DERBY: It seems to me that counsel's position is technical in the highest degree; one that should not appeal to the consideration of the court; this motion was filed immediately upon the filing of the motion to dismiss in order that one of the objections to the motion to dismiss might be obviated, that is, that we might be allowed to amend that motion simply by inserting in the prayer that that bill of exceptions be signed; certainly if that motion will obviate the matter the court will not allow counsel's motion to dismiss on that ground if that amendment will cure it.

Mr. PETERS: I now have a motion to present, a motion to dismiss the bill of exceptions, an objection to the consideration of the purported and pretended amendment of the motion to amend the purported and pretended bill of exceptions filed on the 8th day of June 1904; Your Honor will make a ruling on those matters so I can take my exception.

The COURT: We will take up now the defendant's motion.

Mr. PETERS: What motion your Honor?

The COURT: The motion filed to amend the bill of exceptions.

Mr. PETERS: We take an exception to your Honor at this time taking up the motion to amend the bill of exceptions, and we also take exception to your Honor's refusing to consider at this time the motion to dismiss the pretended and purported bill of ex-
177 ceptions of the defendants filed the eighth day of June 1904, also take exception to your Honor refusing to consider the objection to the consideration of the purported and pretended amendment to the purported and pretended motion to amend the purported and pretended bill of exceptions filed on the 8th day of June 1904.

The COURT: Exception allowed.

Mr. PETERS: We desire to have called Mr. Simonton as a witness, as we gave notice in our motion to dismiss the amendment to the amended purported and pretended bill of exceptions.

Mr. DERBY: I am willing that all the oral evidence that counsel desires to present should be put on before argument.

Mr. PETERS: Then taking that consent of counsel's if the Court please, I take it then that motion to dismiss should be submitted to the—submitted and heard by the court at the present time if counsel has no objection to hearing that motion.

Mr. DEBRY: I withdraw my consent.

Mr. KINNEY: I take it that if there is any evidence to be taken, that will defeat our motion to amend that is not properly in order.

The COURT: The Court has ruled that the motion to amend is now in order, there is no necessity for bringing in evidence to dismiss the motion to amend.

178 Mr. PETERS: We take an exception to the refusal of the Court to allow us to, at this time, to put on the stand and swear, examine for the purpose of adducing evidence, Mr. M. T. Simonton, clerk of this Court, to substantiate the motion and affidavit of plaintiff to dismiss the purported and pretended bill of exceptions of the defendant filed on the 8th day of June 1904.

The COURT: Exception allowed.

Mr. PETERS: We renew our motion to hear my motion to dismiss the pretended and purported bill of exceptions.

The COURT: Motion denied.

Mr. PETERS: Exception.

Allowed.

Mr. KINNEY: I am going to suggest that we will make time by being a little more formal, and suggest that the motion be read with all the affidavits, and then the counter-affidavits on the motion to amend, and proceed formally.

Mr. PETERS: We make a request that plaintiff in this case, by counsel be permitted to cross-examine affiant in the affidavit of A. S. Hartwell, Esq., filed in this court. We also further ask that we be allowed——

Mr. KINNEY: We haven't finished—(continuing) on the notice filed on April 23rd 1906.

Mr. DERBY: I ask to amend the bill of exceptions by asking in that motion that the bill of exceptions be further amended by adding the signature of counsel there, then I will present that with the motion to amend, and ask now to amend that motion to amend by making that a part of it.

179 Mr. PETERS: I object if the Court please to the amending of the respondent's motion to amend the pretended and purported bill of exceptions filed on the 8th day of June 1904 on the ground that the defendants are guilty of laches; it is improper, no proper notice has ever been given to the Department of the Attorney General by anyone representing the defendants for such motion, and that that motion to amend is in itself improper in that it does not

comply with the rules of court in regard to motions as to the motion being founded upon the record or upon the affidavits of parties or counsel or others in their behalf and that it is immaterial and incompetent on the further ground that the time within which bills of exceptions can be filed has already expired by law.

The COURT: Objection overruled.

Mr. PETERS: Exception.

Allowed.

Mr. KINNEY: On the allowance to amend our motion as contained in the last notice, Mr. Peters?

The COURT: Yes.

Mr. PETERS: I made a request to be allowed to examine Justice Hartwell on his affidavit.

Mr. KINNEY: We have now read our motion as amended with our affidavits, and have presented our part of it, reserving of course argument later on; it now comes in for them to put in their counter-affidavits, or oral evidence, and submit that it is up to them, if
180 they want General Hartwell, General Brown, Smith brought in the Court, as they see fit. We are now waiting for them to present their counter-affidavits.

(Argument.)

The COURT: I will allow the cross-examination.

Mr. PETERS: I ask that the Court call the Bailiff and send him to Justice Hartwell with his compliments and ask him to come in to be cross-examined on his affidavit; I want a ruling by the court as to the request of counsel to be permitted to cross-examine Justice Hartwell.

The COURT: The request is granted.

Mr. PETERS: I will ask the bailiff——

The COURT: Don't leave your seat (to bailiff).

Mr. PETERS: We take exception to your Honor not allowing the bailiff to ask Justice Hartwell to come into Court.

The COURT: Exeception. Allowed.

Mr. PETERS: Now if the Court please, I request your Honor to send the bailiff of this Court with the compliments of the court requesting Justice Hartwell to come here into court and take the stand — be sworn for the purpose of cross-examining him by the attorneys for the plaintiff in this case upon his affidavit filed in this case in the matter of the exception to the bill of exceptions on the 24th day of April 1906, by W. R. Sims, Clerk.

The COURT: The Court will not consent to send his compli-
181 ments to Justice Hartwell and ask him to come in to be cross-examined in this case.

Mr. PETERS: We take an exception to the Court's refusal to grant the request.

The COURT: Exeception Allowed.

Mr. PETERS: I will—would like to submit the evidence of George Lucas, I will call him here as a witness relative to that affidavit.

GEORGE LUCAS, Called for plaintiff, sworn.

Direct examination.

By Mr. PETERS, Attorney General:

—. Your full name is George Lucas?

A. Yes.

Q. You are a clerk of the Supreme Court of the Territory of Hawaii?

A. Yes sir.

Q. And have been for a period of how long last past?

A. Oh, for thirteen or fourteen years.

Q. As such Clerk Mr. Lucas you have in your custody the records, files and minutes of the Supreme Court, etc.?

A. Yes sir.

Q. Have you in your possession as such clerk the oath of office of the Honorable A. S. Hartwell, associate Justice of the Supreme Court of this Territory?

A. Yes sir.

Q. As such Associate Justice?

A. Yes sir.

Q. Will you kindly produce that? Have you now brought
182 into court an oath of office of the Honorable A. S. Hartwell as associate Justice of Supreme Court of the Territory of Hawaii?

A. I have two of them here.

Q. Will you let me have that please?

(Witness hands document to the Attorney General.)

Mr. PETERS: For the purpose of having this in evidence, I desire to offer it in evidence, but do not desire them to be marked as exhibits in this case, as they are properly a part of the records in the archives of the Supreme Court and I would not care to file them here, I will read them in evidence.

Mr. DERBY: I object to the introduction of these oaths in evidence on the ground that they are irrelevant, incompetent and immaterial and have no bearing on any of the issues in this case, and on the ground also that they are matters of which the court could take judicial notice without any evidence being given; I would like to call the attention of the court to the fact that these oaths of office, the first one is dated June 9, 1904, the other oath is dated in January 1905 after the judges had been confirmed by the Senate.

The COURT: You are trying to have the court take judicial notice of the fact that Justice Hartwell took oath of office on the fifteenth of July; I can take judicial notice of the fact that he is acting; I do not see that I can take judicial notice of the oath of office of Justice Hartwell.

Mr. PETERS: I take it then, that I may be allowed to read them in evidence.

Mr. PETERS (reads): "Oath of Office for United States
183 Judges, sections 712 and 1757 Revised Statutes: I, Alfred Stedman Hartwell, do solemnly swear that I will administer

justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as associate justice of the Supreme Court of the Territory of Hawaii, according to the best of my abilities and understanding, agreeable to the Constitution and laws of the United States, and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion and that I will well and faithfully discharge the duties of the office on which I am about to enter, So help me God. (Signed) Alfred Stedman Hartwell. Subscribed and sworn to before me this twenty ninth day of June 1904. (Signed) Sanford B. Dole, District Judge of the United States Court, District of Hawaii."

Mr. PETERS (reads): This oath of office is the same with the exception in the date it reads "January 6th 1905." Subscribed and sworn to before "Sanford B. Dole, United States District Judge, T. H."

Mr. PETERS: I will ask Mr. Lucas whether or not you have in your custody or control as clerk of the Supreme Court of this Territory any oath of office of the Honorable A. S. Hartwell, as associate justice of the Supreme Court of this Territory, dated on or about the 15th day of June in the year 1904?

A. I have looked for an oath of that date by the minutes and I have been unable to find any.

Q. Any other of that character?

A. No.

184 Q. Have you got your minutes here Mr. Lucas?

A. The Chief Justice—I have a memorandum of the Chief Justice's oath on that date, on the 14th.

Q. Mr. Lucas have you the minutes of the Supreme Court of the Territory with you?

A. I have not.

Q. Will you kindly get them for the purposes of questions which I shall ask you.

(Witness produces minutes.)

Mr. PETERS: You have with you now the minutes of the Supreme Court of the Territory of Hawaii.

A. A rough minutes, yes sir.

Q. Have you the minutes of June 14th, 1904?

A. I have.

Q. How was the court constituted on June 14th 1904 by your minutes?

A. Frear, C. J., Perry, J.

Q. What minutes have you of the 14th day of June, Tuesday 1904.

A. "Upon order of the Court the Clerk adjourns court until Wednesday June 15th 1904 at ten a. m." Then I have here Judge Frear's oath, and a cablegram.

Q. To whom?

A. Chief Justice.

Q. What have you in your minutes of the court of June 15th 1904?

A. I have no minutes of June 15th, 1904.

Q. Do you know whether or not the court sat on that day?

A. I cannot say now.

Q. If anything—if any business of the court had occurred on that day you would have had it in your minutes wouldn't
185 you?

A. They may have just come in and opened court and adjourned again, something like that.

Q. How as to the 16th, the 17th, 18th, 19th of June following of the same year 1904, will you state whether or not you have any minutes?

A. No sir; June 20th.

Q. Do you know whether or not during the interim of June 14th and June 20th 1904 any business was done by the court?

A. Not according to the minutes.

Q. If there had been any business conducted by the court you would have had it in your minutes?

A. Yes sir.

Q. On the 20th of June Mr. Lucas how was the court constituted?

A. By Frear, C. J., Hartwell, Hatch, JJ.

Q. That is the first time the clerk's minutes show that Justice Hartwell ever sat on the bench?

A. According to my minutes, these minutes, yes.

That is all.

Cross-examination of GEORGE LUCAS:

By Mr. DERBY: What is the nature of those minutes, Mr. Lucas?

A. How do you mean?

Q. Are they a rough memoranda or the regular minutes that are made?

A. They are supposed to be the regular ones when copied in the books in the proper places.

Q. You produced an oath dated June 29th 1904, wasn't an oath taken by Justice Hartwell previous to that time?

A. He may have taken an oath and not presented it to me for copying, because I know that Judge Frear took his oath on
186 that day, that is all I know.

Q. June 14th was—June 14th 1904, was the last day that Judge Perry sat as a justice of the Supreme Court isn't it.

A. Yes sir.

Q. Upon the day following didn't Judge Hartwell and Judge Hatch immediately move up to the Supreme Court and take their chambers there?

Mr. PETERS: Mr. Hatch was not in Honolulu then.

WITNESS: It is likely the two judges came into court and then adjourned again.

Q. Until when—Judge Hatch came back?

A. I think, no I do not know when he took——

Q. Can't you remember Mr. Lucas the oaths being taken in court by Judge Frear and Judge Hartwell on June 15th?

A. They didn't take them into court from the time they went before Judge Dole, United States District Judge, and took oath.

Q. Why is it that you have kept Judge Frear's commission dated June 15th and not Judge Hartwell's?

Mr. PETERS: I object, it is assuming there was an oath in existence at that time.

The COURT: Objection sustained.

Mr. DERBY: Have you seen any commissions of Judge Hartwell or Judge Hatch?

A. No.

Mr. PETERS: I object, it is assuming a fact not in evidence, that there is a commission.

187 Mr. DERBY: Was it a commission of June 15th 1904?

A. Commission of June 15th 1904.

Q. Yes, of Judge Hartwell's.

A. I cannot give you the date. I know I had a copy of Judge Frear's, Judge Hartwell's and Judge Hatch's commissions.

Q. You say that on June 20th Judge Hartwell began to act as a member of the Supreme Court?

A. According to these minutes.

Q. How is it that you know Mr. Lucas that Judge Hartwell was acting as a justice of Supreme Court on June 20th 1904 when you just put in an oath of his dated June 29th?

Mr. PETERS: I object to the question on the ground that it is purely argumentative and not proper cross-examination; how does he know, the record is the best evidence of what was being done; simply a conclusion of Mr. Lucas' to explain why it was a person——

The COURT: Objection overruled.

Mr. PETERS: Exception. Allowed.

WITNESS: Well, as I said, I produced the oaths that I have the copies or originals of, but he may have taken an oath before Judge Dole and not handed it to me to copy in my minutes as Judge Frear has done.

Q. Didn't Judge Frear Mr. Lucas make an oath both on the 15th of June and 29th of June?

Mr. PETERS: I object to the question as immaterial and not proper cross-examination.

188 Hon. GEORGE D. GEAR—direct examination:

Called for plaintiff.

Mr. PETERS: I will waive the swearing of Judge Gear.

Mr. PETERS: Judge Gear you made an affidavit did you not on the 16th day of April in the year 1906?

A. I did.

Q. Before P. Silva——

A. I don't remember whether I made on *on* that day or not, if you got that date on that document, I did.

Q. I hand you a part of the record in this case—I hand you here the affidavit of George D. Gear, filed in this case on the 17th day of April 1906 by W. R. Sims, Clerk, and ask — you are the George D. Gear named in that affidavit?

A. I made this affidavit on the 16th day of April 1906.

Q. Judge Gear, do you remember when your term office expired as second judge of the *second judge of the* circuit court of the first circuit—the third of March wasn't it?

A. I don't remember what day it was; I know when my— I was confirmed on the fourth day of March, but as a matter of fact the clock of the senate was turned back on Saturday night, and on Sunday the Senate held their session, and Monday; I was confirmed on Monday the fourth of March for four years; now when my office expires is more than I know; the President was inaugurated on the fourth of March, and the Senate held over——

Q. In any event——

A. It is a question in my mind——

Q. In any event that was in the year 1905?

A. The year 1905.

Q. Judge Gear, do you recollect when you went to San Francisco, wasn't it on the seventh day of December, 1904?

189 Mr. DERBY: I object to that question as having absolutely no bearing on the question now under discussion; on the motion to dismiss the motion to amend the bill of exceptions.

The COURT: Sustain the objection.

Mr. PETERS: Exception. Allowed.

Mr. PETERS: Judge Gear, you say that the defendants' bill of exceptions in the above cause, in the case of Territory of Hawaii *v.* Cotton Brothers was before you as such judge, did you ever see that bill of exceptions?

A. I did.

Q. When did you see it?

A. I cannot tell you, I do not remember the date, that is all.

Q. Will you say, on your cross-examination here Judge Gear that you saw that bill of exceptions on the 8th day of June 1904?

A. No I cannot say that.

Q. Will you say Judge Gear, that on that day there was presented to you by Justice Hartwell, or anybody else, a bill of exceptions in that case, Territory of Hawaii *v.* Cotton Bros.?

A. On the 8th day of June?

Q. Yes?

A. There might have been; I do not know whether there was or not, I cannot swear to it; I cannot swear it was on the 8th day of June.

Q. If Justice Hartwell says that was the day?

A. I will say that was the date; Justice Hartwell came into my

room and presented to me a bill of exceptions, but what the
190 date was I cannot say, I cannot keep those things in my mind, I would not swear to it, swear that it was the 8th day of June or swear that it was not done on the 8th day of December, I know it wasn't as late as November or December, but I can't swear——

Q. Why wasn't it on the 8th day of December?

Mr. KINNEY: I object.

WITNESS: It wasn't as late as that; you asked why it wasn't, I said it wasn't on the 8th of December, or the 8th of November; I have just heard when Justice Hartwell went on the Bench; I know it was before he went on the Bench;

Q. I would like to get your idea, of whether or not you will say that the bill of exceptions, that is, the alleged bill of exceptions filed in this case on the 8th day of June 1904, was presented to you by Justice Hartwell or any other person within twenty days after the 27th day of May 1904?

Mr. DERBY: I object to that; that is absolutely incompetent——

The COURT: Objection overruled.

WITNESS: I cannot remember now; I do not remember any dates Mr. Peters.

Q. Now Judge, you say that it was before Judge Hartwell was on the Bench, when you say that it was before Judge Hartwell went on the Bench you mean relative to his oath of office on the 29th day of June 1904?

A. I do not know when he took the oath of office Mr. Peters.

Q. Do you mean Judge Gear when you say "before Judge Hartwell went on the Bench" that he was absolutely hearing
191 cases as a judge—as a member of the Supreme Court, or was it simply before he entered upon his duties, had been appointed, something of that character——

A. To the best of my recollection it was before Judge Hartwell was appointed judge.

Q. Where were you when Judge Hartwell handed you the bill of exceptions?

A. In the room now occupied by Judge Lindsay.

Q. Did you look at the bill of exceptions?

A. Not with any care at that time.

Q. Do you know whether or not the bill of exceptions had at the time that they were presented to you already been filed?

A. I did not.

Q. What became of them, did you keep them?

A. I do not know that.

Q. They were presented to you for allowance and signature as I take it as judge trying the case?

A. Yes.

Q. Didn't you keep them in your possession?

A. I do not remember what was done with it, whether it was—I had all my papers in that case I think in my room, and I afterwards

took those papers over to my room at the Young Hotel where I had my books to write the decision in the case; now whether that bill of exceptions was put in with those papers now I don't know. I only remember this, I do not remember what was done with them, I do remember the bill of exceptions was brought in to me by Justice Hartwell; I do remember there was a reference made at the time by General Hartwell that he only wanted to save his point, something of that kind; I know that General Hartwell presented me with the bill of exceptions. But I never went into them, never signed them, that is, as I remember it; I know I never passed on any bill
192 of exceptions, but what day it was I will not attempt to say; there were a good many things in those days to *to* remember, unless they were in my diary——

Q. Was anybody else present Judge Gear when Mr. Hartwell presented *do* you this bill of exceptions?

A. I do not know, not that I can remember; there might have been, I do not remember whether the clerk was in there or anybody else.

Q. You do not remember whether it was in the forenoon or in the afternoon?

A. No I do not.

Q. Did you make any notation of the receipt of the bill of exceptions?

A. Unless it was on the bill of exceptions, I don't think I did, I might have, I don't think that I ever did make on any bills of exceptions.

Q. But your recollection is that — received the bill of exceptions from Judge Hartwell and took them over to your room in the Young hotel?

A. No I have absolutely no recollection of what was done with them, unless they were put in with the Cotton Brothers papers.

Q. Were Cotton Brothers papers in your room at the time——

A. I do not remember, Yes, Cotton Brothers papers were in the room at the time, I am pretty sure, or in here—might have been in here.

Q. So the best of your recollection then is that the bill of exceptions was placed with the record either in your room or in this court room where you presided as judge during your incumbency?

A. No, I will not say that Mr. Peters; if they were placed—I do not know where they came from, might have been in my
193 papers I do not know where I got them, whether from the court room, I might have left them in that room, I left a number of papers in that room (apparently referring to chambers) that I never took out.

Q. Who was your clerk, at the time, Judge Gear?

A. Mr. Sims.

Q. It couldn't have been that you received the bill of exceptions from the clerk?

A. No it could not have been, unless I received also the papers from the clerk, it might have; I know that General Hartwell—I had

a conversation with General Hartwell and that is the reason I know that General Hartwell handed the bill of exceptions himself personally to me.

Q. Was the conversation about the case?

A. It was about the case.

Q. You have a clear recollection about the conversation?

A. Yes, I have a recollection about one thing; that a statement was made that he only had, as I remember there was only one exception, and he spoke about the case of having been tried in such a manner that there was no necessity of any more exceptions. Judge Hartwell made the statement and I thought at the time it was strange that he should bring in a bill of exceptions because I thought that there wasn't an exception in the whole case; when General Hartwell tried the case he tried it without taking any exceptions, practically, and I wanted to know what it could be in the bill of exceptions, and he made the statement that it was to save his rights, at the time I supposed that it was something—well, General Hartwell had a talk with me about it at the time, I cannot say what day it was.

Q. You are sure it was the original bill of exceptions, or couldn't it have been a copy?

A. It might have been a copy.

194 Q. If I showed you the bill of exceptions and you saw on the face of the bill of exceptions that they were filed on the 8th day of June 1904, but not by your clerk, but by M. T. Simonton, Clerk of the Third Judge, would your doubt be strengthened relative to it being the original, wouldn't you say more advisedly than before that it was a copy handed to you by Justice Hartwell and not the original?

(Hands witness document.)

A. I do not know, I will state that I cannot tell; I would not want to attempt to tell you, to state whether it was marked filed or not.

Q. How can you explain Judge that that bill of exceptions as you say, was presented to you—it bears the filing mark of June 8th, which is absolutely contrary to the practice here——

A. Bills of exceptions have been filed and never been allowed——

Q. And have never been presented to you, put on file with the clerk?

A. I do not know about filing with the clerk; bills of exceptions are presented to me and I have never taken any action on them until the attorneys direct me, asked me, I paid no more attention to them.

Q. After you settled and signed the bill of exceptions you gave it to the attorney to do his own filing?

A. I don't know.

Q. It would have to be filed?

A. I do not know whether it would be filed until after it is settled?

Q. The usual practice is to file them after they are settled, after their presentation to the trial judge?

A. I will tell you Mr. Peters I cannot talk about the usual prac-

tice, because I do not believe I have settled—I do not
195 think I have had over two or three bills of exceptions before me.

Mr. KINNEY: Your contention is that the bill of exceptions should be filed before presented to the judge for settlement——

Mr. PETERS: That is your contention——

Mr. KINNEY: What is it you contend should be done——

Mr. PETERS (to Witness): You are not sure whether or not it was filed within twenty days after your—after the verdict, I mean presented to you within twenty days after the verdict?

A. No, I do not know whether the verdict was rendered.

Q. May 29th 1904?

A. No I cannot tell you anything about it.

That is all.

M. T. SIMONTON—Direct Examination:

By Mr. PETERS: Mr. Simonton I hand you here a purported and pretended bill of exceptions, being denominated "defendants' bill of exceptions filed June 8th 1904 in the case of the Territory of Hawaii *v.* Cotton Brothers, and ask you if that is your signature as clerk?

Mr. KINNEY: To the pretended bill of exceptions?

WITNESS: That is my signature.

Q. Where were you when you put that signature on there?

A. I know I did; I was in the court room some place, I don't know where.

196 Q. You do not recollect at all where you were when you signed that?

A. No I have no idea.

Q. On the 8th day of June 1904 was you acting before Judge Gear as clerk?

A. The only way I could tell would be by looking at the record book in there.

Q. On the 8th day of June 1904 you were clerk of the Honorable W. J. Robinson, third judge of this court were you not?

A. I was.

Q. Will you look on your records of June 8th 1904 and see whether or not you acted as clerk for his Honor Judge Gear?

A. I think it would appear in Judge Gear's minutes.

Mr. KINNEY: I submit that is immaterial.

The COURT: Are you clerk of Judge Robinson or are you not a clerk of the circuit court?

Mr. PETERS: I admit that he is a clerk of the circuit court.

Mr. KINNEY: The question we object to, that he wanted to ask, whether he was acting as clerk to Judge Gear, as irrelevant, incompetent and immaterial; is counsel attacking the right of the witness to act as clerk of the circuit court of the first circuit and to place the file mark upon papers brought to the circuit court of the first circuit?

Mr. PETERS: I am simply trying to arrive at the circumstances

under which this document was received by the clerk and a file mark put upon the paper.

197 The COURT: Objection overruled.

(Witness leaves the stand to search the records and resumes the stand and answers:)

WITNESS: Nothing there your Honor; never heard of the case, so I know I wasn't here on that day (meaning in Judge Gear's court).

The COURT: In your capacity as one of the clerks of the circuit court of this circuit isn't it a frequent occurrence that if you are absent or one of the other clerks, for instance, Mr. Sims and an attorney had a document to file, that he might hand it to you instead of Mr. Sims, in the place of Mr. Sims?

A. Certainly your Honor, that is often done.

Mr. PETERS: That happens Mr. Simonton, doesn't it, not while you are acting in the court room as clerk to Judge Robinson, but in the outside office, the general office, that is, the office of the Supreme Court?

A. They are; papers are often brought into the judge's chambers and they are filed——

Q. I mean in the judge's court room, haven't attorneys——

A. Hand me papers to file——

Q. —handed you papers pending in your court?

A. Yes.

Q. What do you do with them?

A. I file them, put them in the tin, register them.

Q. Where does that tin go, in the clerk's office of the Supreme Court?

A. The papers go to Henry Smith.

Q. And Henry Smith is clerk of the Judiciary Department?

198 A. Yes.

Q. You are not in the habit of receiving papers for purposes of filing them, putting the file mark on them and giving them back to the person who presents them?

A. I have never done it yet to, not to my knowledge.

Q. So far as your method of filing papers is concerned, when once you file a document you keep it and it goes with the record in the case on file in the clerk's office?

A. Yes sir.

Q. Supposing the records are not in the clerk's office, doesn't go in the clerk's office just the same?

A. I always put them in the tin where the cases are put when—on the counter, there is a tin there where the cases are put.

Q. There is an exception that you make to that, in the case where a brief is filed in some action pending in your court——

A. In pending cases I always hand that to his Honor; I make an exception to that if a brief is filed in a case pending I always hand that to the judge because I know he is considering the matter.

That is all.

Cross examination of M. T. SIMONTON:

By Mr. KINNEY: Mr. Simonton when bill of exceptions is presented to you for filing what do you do with it?

A. I usually hand it over to the judge, file it.

Q. Hand it over to the judge before you file it?

A. No, I used to — that, I guess, until I didn't know any better, when a paper was handed to me I would file it, but I know enough now not to file it until the judge has put his o. k. that they are settled and allowed, until the court has settled the exceptions I always——

199 Q. Now a bill of exceptions is brought to you to-day, we will say, you do not put any file mark on it at all?

A. No I do not; I look at it and see if the judge has put his signature to it first.

Q. To see if he has allowed the bill of exceptions before you file it, in other words you never file a bill of exceptions until it has been allowed?

A. No, I think I have done—when I first came here, and I didn't know any better, but the judges called my attention to it a number of times before——

Q. When you didn't know any better what did you do? what did you do with bills of exceptions?

Mr. PETERS: I object to that——

The COURT: Objection overruled.

Exception. Allowed.

WITNESS: First the person would hand me a paper to file it——

Q. How did it get to the judge?

A. Well, that is, I don't know.

Q. Don't you remember, that attorneys would bring you in a bill of exceptions and you would marked it "filed" and then the attorney would take it to the judge?

A. No, I don't remember that—remember any instance of that kind; I gave the person the paper after I had filed it, hand it back to him.

Q. And he would take it into the judge?

A. Yes; I don't remember any instance.

Q. Then I will ask you when you first started in how did bills of exceptions get to the judge who is to pass on it?

A. The attorneys used to take them there.

200 Q. That is what I am saying—isn't it customary to bring in bills of exceptions, have it marked as filed, and then you allow him to take it into the judge—the attorney then takes it into the judge, having filed it, and he presents it to the judge?

A. I do not think that is that way; as far as I know, in Judge Robinson's court, they take them into the judge and after he approves of them then they come to me to file them.

Q. But in any event it is the attorney that takes it into the judge?

A. Yes.

Q. You do not?

A. No.

Q. Either when you first started in?

A. No I do not remember anything of that, the attorneys take them into the judge.

Q. And always take them in?

A. As far as I know.

Q. So in this bill of exceptions, so treated in this case, generally where the attorney who filed that bill of exceptions or whether the attorney who filed this bill of exceptions took it into the judge you do not know?

A. I do not.

Q. On the question of whether it was presented to the judge before or after it was filed you do not know?

A. I have no idea, whether before or after, it might have been handed to me when I was busy and filed it, the file mark may have been put on it.

Q. Before the attorney took it into the judge or put it on afterwards, you do not know which?

A. I do not know, no.

Q. Speaking of this particular bill of exceptions that has been shown to you——

201 A. I do not remember that bill of exceptions, in fact I would not know it, only my signature is on it, but I do not remember seeing it.

Q. In the ordinary course of business you put that mark on it as the duty of a clerk?

A. Yes.

That is all.

Redirect examination of M. T. SIMONTON:

MR. PETERS: When you say that you have never filed a paper and allowed the person filing it to take it away again after filing it you apply that statement unqualifiedly as well before you knew any better as afterwards?

A. No, I do not remember any attorneys taking any papers, I made a practice to put them where they belonged.

Q. So far as the question of bills of exceptions are concerned, that is, the receipt and filing of bills of exceptions, you mean that when, before you knew any better you received them for filing and filed them and kept them in your custody, or passed them over to the tin in the clerk's office?

A. As far as I remember, I do not remember——

Q. So that as far as you know of the presentation of papers are concerned to you at any time you always received them, filed and kept them in your custody until transferred to the clerk's office?

A. I believe I have always made it a practice to put them in there for the attorneys to take them from there.

Q. From where?

A. From the tin where they belong, in the front office.

Q. So that at any time papers were taken from the tim*e* it was done without your knowledge or consent?

202 A. Yes, I have nothing to do with them after they go in there.

That is all.

Recross examination of M. T. SIMONTON:

By Mr. KINNEY: What do you mean, "without your consent" would there be any——

A. I have nothing to do with the papers after they are filed and put there; they are put in there to be put away in the vault.

Q. It is presumed isn't it that when an attorney presents his bill of exceptions to the judge——

Mr. PETERS: I object to the question, what he presumes, if the Court please.

Mr. KINNEY: What is your, the nature of the practice, it is expected isn't it that an attorney will see to it that his bill of exception is presented to the judge——

Mr. PETERS: I object to the question, as the practice is fixed by law; the question isn't, what is customary as far as this clerk is concerned.

The COURT: Objection overruled.

Exception.

Allowed.

WITNESS: It is as far as I know it.

Mr. PETERS: It is not your business to present bills of exceptions to the judge, is that what you mean, what do you mean by that?

A. I have nothing to do with them.

203 Hon. A. S. HARTWELL—Direct examination:

Called for defendants.

Mr. PETERS: I object to any further evidence, if the court please, as far as the respondent in this case is concerned, on the ground that they have submitted to the court their case in chief on affidavits—on the affidavit of A. S. Hartwell as well as others; that so far the examination of witnesses by the plaintiff in this case have been simply on the affidavits presented. I object if the Court please, that it is untimely irrelevant, incompetent and immaterial, seeking to put in direct evidence upon their case again in chief for the establishment by defendants of the fact that the bill of exceptions was prepared, presented for allowance and signature within the time required by law.

Mr. DERBY: Now we propose to show the day that General Hartwell became a member of the Supreme Court, that it was actually done on June 15th 1905, that having been brought out we have clearly the right to show that in rebuttal of the evidence given by plaintiff.

Mr. PETERS: I submit if the Court please, this has all been a matter of affidavits in chief, affidavits relative to the presentation of the bill of exceptions——

The COURT (to Mr. Derby): What would that add to the affidavits on file?

Mr. DERBY: I think it would add this, if the court please, it would explain Mr. Lucas' evidence that he filed the affidavit on June 29th 1904 and that he did not have the other affidavit or any other
204 affidavit on June 15, 1904; it seems to me we should have the right to put on oral evidence to contradict or explain——

Mr. Peters (argues).

The COURT: Objection overruled.

Mr. PETERS: Exception.

Allowed.

Hon. A. S. HARTWELL—Direct examination:

Called for respondents, and sworn.

By Mr. DERBY: Judge Hartwell, the oath of office subscribed to by you has been offered in evidence in this case, dated June 29th 1904 for the purpose of showing that you did not become a member of the Supreme Court until that time, I would like you to explain the circumstances under which that oath of office of June 29th was made —1904?

A. On June 14th 1904 I received a cablegram, which I have not with me now, it can be verified, if important, verified by reference to the Cable Office in Honolulu—informing me that I was appointed and that I was to qualify immediately.

Q. Cable from whom?

A. Attorney General Knox. I did so; Chief Justice Frear had a similar cablegram; we saw Judge Dole who kindly came upstairs, went into the Court room of the Supreme Court, and administered the oath of office to us on that day.

Q. What became of that oath of office?

A. What became of that oath of office I do not know; I could easily—I may have sent it myself to the Attorney General's office, but I cannot say that I did. I looked in the Clerk's office here to find it this afternoon, and I found it was not there and a copy was not there, although either the originals or copies—I cannot at
205 this moment say which—of the Chief Justice's oath and Justice Hatch's oath were there of the later date as well as the earlier date. I received a letter, and I presume a similar letter was sent to the other Justices, the Chief Justice and Justice Hatch, but I cannot speak of my own personal knowledge now, from the Chief Disbursing clerk of the Department of Justice. I fortunately called Mr. Derby's attention to it a little while ago; it is dated June 27th, which I would like to hand in, addressed to myself.

(Reads.)

And that explains, as far as I can now think of, why an oath of office was taken after receipt of this letter; my impression, however, is, if impressions are permitted in this Court to be given as evidence, that not only was an oath taken on the 14th of June, of which I know clearly, I know that clearly, but an oath might have been taken after the receipt of this letter, and in consequence of it; also even

a third oath, but there I am uncertain; that is merely an impression; my memory does not serve me there, but this letter explains, I think, why the later oath was taken, whatever day it was taken it certainly was taken on the 14th of June.

Mr. DERBY: I would like to ask one more question, that is, whether—Well, that is all.

Cross-examination—Hon. A. S. HARTWELL:

By Mr. PETERS: You say Justice Hartwell that you took an oath on the 14th day of June 1904 before the Honorable Judge Dole of the United States District judge of this district?

A. You are correct in your statement of my evidence, Mr. Peters.

Q. And did you subscribe to the oath before the judge after
206 being sworn—a written form of oath?

A. Yes.

Q. And did you leave that written form of oath so subscribed with Judge Dole or take it with *you*?

A. I cannot say which I did, or what I did with it.

Q. Your recollection is that record then does not serve you?

A. You understand, I cannot recollect precisely.

Q. Then what was the occasion of the oath of the 29th day of June following subscribed to before the same judge, that is, Judge Dole of the United States District Court?

A. That I cannot now state any more clearly than I have stated; and in this letter calling my attention to the fact, that it recites the nature of the oath called for, if one had not meanwhile been taken; whether or not our attention was called to it by cablegram, or by looking into the statute requiring it to be done or in wh[illegible] way I cannot say, I cannot explain, any further than I have done.

Q. Well, you subsequently took an oath did you not on the 6th day of January of the following year, 1905, before the same judge?

A. If you have looked it up and found it so, I will not yet say you are correct, I haven't looked it up, except that upon receipt of the permanent commission, at sometime in December, I am not sure, that another oath was taken on that commission, but I cannot give you the dates, because I haven't undertaken to verify them.

Q. Justice Hartwell, you stated in your affidavit in this case that you transferred the case—meaning the Territory of Hawaii against Cotton Brothers—to W. A. Kinney, can you say what was the date of that transfer?

207 Mr. DERBY: I object to that; that is not cross-examination in any way. He was called for the purpose of one question.

Mr. PETERS: I submit if the Court please, as I understand it, Justice Hartwell was called upon all matters relating to this motion of defendants.

The COURT: I think the objection is well taken.

Sustain the objection.

Mr. PETERS: Exception.

Allowed.

Mr. PETERS: If the Court please, inasmuch as Justice Hartwell is

on the stand I would request the Court's permission at this time to cross-examine Justice Hartwell on the affidavit filed here in this case, which is a portion of the motion of defendants in this case relative to the amendment of the bill of exceptions.

Mr. KINNEY: I object to that; we have called Justice Hartwell only to show the date of his commission; we called Justice Hartwell on rebuttal; if the case is going to be reopened I submit it should be reopened upon some definite offer of counsel or some definite showing of counsel, on—not on a general fishing expedition, if there is something in that affidavit that he questions.

Mr. PETERS: I submit the stand of counsel should not be taken for the reason that the request has been granted for this evidence; there is no necessity of making a formal offer of proof, or anything of the kind; the Court granted the request to cross-examine upon
208 the affidavits; but would not permit or assist us in securing the attendance, now if the Court please, that the Justice is on the stand the same condition that existed before do not now at present exist.

The COURT: I do not see how it would be reopening the case, Mr. Peters has not closed.

Mr. KINNEY: I am asking him to state wherein he wants his case reopened, upon what grounds; his case is closed entirely, and we called in Judge Hartwell in rebuttal, confining it strictly to the oaths.

The COURT: Objection is sustained.

Mr. PETERS: Exception.

Allowed.

Mr. PETERS: I desire to ask you Justice Hartwell whether — not the statement in your affidavit, dated the twenty-fourth day of April 1906 "according to my best recollection" qualifies the word, "presented" relative to the presentation of the bill of exceptions to Judge Gear as well as the statement, "that the bill of exceptions was filed on the eighth day of June 1904?"

Mr. KINNEY: I object to that on the same grounds, not cross-examination on what we examined him upon, or remotest reference to it.

The COURT: Objection sustained.

Mr. PETERS: Exception.

Allowed.

209 Mr. PETERS: I will ask you, Justice Hartwell, whether or not the statement that you filed—"that you "presented the bill of exceptions" as qualifying that the presentation was "according to your best recollection?"

Mr. KINNEY: I object to that on the same grounds.

The COURT: The same ruling. Sustain the objection.

Mr. PETERS: Exception.

Allowed.

That is all.

That is all.

WITNESS: Perhaps I ought not to say anything of the affidavits, but I will say if there is anything the Court would like me to explain of my own knowledge I would only be too glad to do so.

The COURT: No.

Honorable W. F. FREAR, called for respondents.

Mr. PETERS: We will waive the oath.

Mr. DERBY: Judge Frear, affidavits have been put in evidence in this case of an oath of office made by Judge Hartwell on the 29th day of June 1904, the day they claim that he became Justice of the Supreme Court, I will ask you if you know of any oath taken by Justice Hartwell as a member of the Supreme Court prior to June 29th, 1904, and if so, when that oath was taken?

210 WITNESS: He took an oath at the same time that I took mine, on the 14th of June, 1904.

That is all.

Cross-examination—Hon. W. F. FREAR:

Mr. PETERS: Are you sure of that, about that, Judge?

A. Yes.

Q. How do you explain that the oath is not on file in the clerk's office of your court?

A. I do not know, unless it is an omission of the clerk to keep it.

Q. Your oath is there all right—I will say that also appears by the evidence of George Lucas, but you are quite sure——

A. I think on one or two occasions oaths were not copied immediately, as the oaths were either locked up in the drawer of the justice or taken by him, for some reason or other, on this particular occasion I do not remember, but I know on one or two occasions there was some delay, and possibly the clerk never got that oath at all.

Mr. PETERS: But you are quite sure that it was on the 14th of June?

A. Yes.

Q. Do you recollect how you—how soon after the 14th day of June that you took your oath of office again?

A. I took oath on the 14th——

Q. After that you took another oath, when was it?

A. I could not tell from memory the exact date, but I have seen the oath and it is on the 29th of June; I have seen it to-day, to refresh my memory, and I find it was on the 29th day of June, otherwise I could not have fixed the date; I could have told you that I did about two weeks later.

211 Q. But Judge Frear, from an examination of the minutes of the Court there is nothing apparent there from the 14th to the 20th, that is, three cases having been heard by the Court on the 20th, from a conversation I had with you the other day in your chambers relative to the—that was the 20th day wasn't it—case of Fuller *v.* Rapid Transit Company?

A. I think that was on the 20th; that is the first time we heard cases.

Q. Then, as I take it, it was the first time that the Court as then constituted, yourself, Chief Justice, Associate Justice Hartwell and Associate Justice Hatch, sat as a Court?

A. I think so; I cannot say definitely, but, I think Judge Hatch was away on the 14th, on the mainland, and did not arrive until several days after that.

That is all.

Redirect examination of Hon. W. F. FREAR:

By Mr. DERBY: Mr. Peters referred to a conversation with you, I would like to ask whether in that conversation with Mr. Peters you did inform him that the oaths of office had been taken by the Justices before the 29th of June?

Mr. PETERS: I will admit that the Chief Justice told me that (to the witness) and I also explained to you, Judge Frear, that I could not find those oaths of office?

A. I think so.

Q. As far as you know these (referring to documents in his hand) are the only oaths of office, that is, yourself, Justice Hartwell, and Justice Hatch, of the 29th of June, then following upon a subsequent commission, on the 6th day of January, those are the only ones recorded in the clerk's office are they not?

212 A. I don't know about that; the clerk might tell you about that.

Q. The clerk says that is all there are.

A. I can explain how these oaths were taken, came to be taken on the 29th of June——

Mr. PETERS: If you please?

WITNESS: We took the first oaths on the 14th of June in response of cablegrams from the Attorney General requesting us to qualify at once; we had no forms of oaths and so we made up forms—typewritten forms—ourselves from the United States Statutes books, then when our commissions arrived afterwards they were accompanied, as usual in such cases, with a form of oath—printed form of oath, sent from the attorney general, and as a matter of extra precaution we took those oaths also.

That is all.

Mr. DERBY: I ask that the time be extended until one day after the decision of the defendants' motion to amend.

Mr. PETERS: I will object on the ground that this Court is endeavoring to give the defendants in this case a right to file a bill of exceptions after this court has lost its jurisdiction——

The COURT: If he has the right.

Mr. DERBY: If we have a certain right, as ask that it be extended one day after the decision on the motion to amend; it seems to me, my request is that if we have the right to file further bill of exceptions

tions in this case that that right be extended one day after the decision on the motion to amend.

213 Mr. PETERS: In this Court —?

Mr. DERBY: I say the decision on the motion to amend the bill of exceptions, this Court I mean.

Mr. PETERS: I objected, if the Court please, on the ground that the defendants in this case have already lost their right to file any bill of exceptions or have any time within which to file a bill of exceptions extended, on the ground that the time required by law has expired.

The COURT: Objection overruled.

Mr. PETERS: Exception.

Allowed.

The COURT: And the Court grants the Motion of Mr. Derby's herein, if — has the right, to file it one day after the decision on the motion to amend.

Mr. PETERS: We take an exception to that order of the Court.

Allowed.

Saturday, April 28th, 1906, 9 o'clock a. m.

TERRITORY OF HAWAII
v.
COTTON BROTHERS.

After argument on both sides on defendants' motion to amend the bill of exceptions, the court grants the motion, allowes the amendment.

Mr. PETERS: We take an exception.

Allowed.

The COURT: The Court grants defendants' motion.

214 Mr. PETERS: We take an exception: That is, to the defendants' motion to amend the bill of exceptions filed on the 8th day of June 1904.

Mr. DERBY: We ask until Tuesday——

Mr. PETERS: Your Honor can very readily see that we are becoming—it is becoming complicated relative to the plaintiff's motion to dismiss the bill of exceptions. If the Court will allow me to request this, that the motion to dismiss not alone include in it the affidavits on file, the pleadings, and proceedings had prior to the filing of the motion to dismiss, but also all the proceedings had up to now; if there is no objection to that, if the Court please, I take it that the affidavits in evidence as taken in our motion to dismiss?

The COURT: Yes.

Mr. PETERS: So that I ask the Court that the motion to dismiss be taken up, your Honor, and a decision had thereon.

The COURT: The motion to dismiss is denied.

Mr. PETERS: We take an exception.

Allowed.

Mr. DERBY: We ask until Tuesday.

Mr. PETERS: I object to any time given to filing of the amended bill of exceptions on the grounds already stated, upon the objections to the motion as amended to amend the bill of exceptions of
215 the defendants' filed on the 8th day of June 1904, and on the further ground now that the motion to amend has incorporated in it the proposed amendments, and there is no necessity for filing the bill of exceptions as the motion to amend has been granted and the amendments are taken as a part of the proposed bill of exceptions.

The COURT: Objection overruled.

Mr. PETERS: Exception.

Allowed.

The COURT: Counsel will be allowed up to and including Tuesday in which to file the bill of exceptions.

Mr. PETERS: I want decided at the present time what counsel is going to do with the time given to him by this Court relative to filing the bill of exceptions; I am not going to be confronted with two bills of exceptions in this case, one upon the granting of the motion, another for more time.

Mr. DERBY: We abandoned any right to file any further bill of exceptions provided we got our amended bill of exceptions filed and allowed.

Mr. PETERS: If he amends the bill of exceptions I do not propose to stand acquiescent with an order of the Court allowing further time in which to file a bill of exceptions and also a decision by your Honor granting them leave to file their bill of exceptions, and I submit that they here and now elect to what they — going to proceed upon, whether the bill of exceptions as amended or the order— which they propose to file—of your Honor allowing them
216 further time in which to file the bill of exceptions.

The COURT: They will be given further time on the amended bill of exceptions, which are to be filed by Tuesday. That is the order of the Court.

I hereby certify that the foregoing is a true and accurate extension of my shorthand notes taken in the above entitled case.

Dated, at Honolulu, May 18th, 1906.

(Signed) G. D. BELL,
Official Court Stenographer, Second Judge, First Circuit Court, Honolulu.

Endorsed: Circuit Court 1st Circuit. Territory of Hawaii *v.* C. E. Cotton *et al.*, doing business as Cotton Bros. & Co. Transcript. Filed May 18, 1906, at 4:5 p. m. J. A. Thompson, Clerk.

217 In the Supreme Court of the Territory of Hawaii.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

C. E. COTTON, E. J. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Motion to Dismiss Defendants' Amended Bill of Exceptions.

Now comes the Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, plaintiff in the above entitled action, and moves this Honorable Court that the pretended amended bill of exceptions of defendants' be dismissed on the grounds following, that is to say:

I.

That the defendants' bill of exceptions filed on the 8th day of June, 1904, upon which the defendants' amended bill of exceptions is predicated, was not within the time limited and required by law after final judgment, presented to the trial judge for allowance and signature.

II.

That said original bill of exceptions of defendants filed on the 8th day of June, 1904, upon which the defendants' amended bill of exceptions is predicated, did not contain any valid, legal or proper exception.

218

III.

That the original bill of exceptions of defendants filed on the 8th day of June, 1904, upon which the defendants' amended bill of exceptions is predicated, is not signed by the defendants herein, nor by any one on their behalf.

IV.

That said original bill of exceptions upon which defendants' amended bill of exceptions is predicated, did not contain as a part thereof, or by reference thereto, any of the pleadings, exhibits, clerk's minutes, transcript of the stenographer's notes, or record in the above entitled cause.

V.

That it neither appears from the original bill of exceptions filed on the 8th day of June, 1904, nor by the defendants' amended bill of exceptions, and particularly by the first exception of said amended bill of exceptions, that the defendants excepted to the verdict of the jury as being contrary to the law and the evidence in the presence of the jury and before the jury retired.

VI.

That Exceptions 2 and 3 and 4 and 5 and 6 and 7 and 8 and 9 are entirely new exceptions and do not constitute amendments of any alleged or pretended exception or exceptions contained in the original bill of exceptions of defendant filed on the 8th day of June, 1904.

VII.

That Exceptions 2 and 3 and 4 and 5 and 6 and 7 and 8 and 9 of defendants' amended bill of exceptions were not, nor any of them was, incorporated as a proper, valid and legal exception in the original bill of exceptions filed on the 8th day of June, 1904.

219 VIII.

That none of the papers in this cause referred to and made a part of the pretended bill of exceptions were made a part of by reference, or otherwise, of the original bill of exceptions of defendants, filed on the 8th day of June, 1904.

This motion is based upon the certified copy of the record on file in this Court and cause, used upon the writ of error in this cause to the Circuit Court of the First Judicial Circuit, as well as upon the certified copy of the record filed by the defendants herein upon the amended bill of exceptions herein, as also the transcript of the stenographer's notes of the hearing of and proceedings had upon and in relation to the original and amended bill of exceptions of defendants.

(Signed) E. C. PETERS,
Attorney General for Plaintiff.

220 In the Supreme Court of the Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

C. E. COTTON, E. J. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Notice.

To the above named defendants and Messrs. Kinney, McClanahan & Cooper, Attorneys for Defendants:

You and each of you will hereby please take notice that the foregoing motion will be presented to the Honorable the Supreme Court of the Territory of Hawaii on Monday, the 27th day of May, A. D. 1906, at the hour of 10 o'clock A. M. or as soon thereafter as counsel may be heard.

(Signed) E. C. PETERS,
Attorney General, for Plaintiff.

Endorsed: Supreme Court Territory of Hawaii. — Term, 190-. — Session 190-. The Territory of Hawaii etc. Plaintiff *vs.* Cotton Bros. & Co. Defendants. Motion to Dismiss Defendants' Amended Bill of Exceptions and Notice. Filed May 25, 1906 at 3:50 P. M. J. A. Thompson, Clerk Supreme Court. E. C. Peters Attorney General for Plaintiff.

221 (Section 1170 Civil Laws.)

In the Supreme Court of the Territory of Hawaii, October Term, 1905.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Supt. Public Works, Territory of Hawaii,

vs.

E. J. COTTON ET AL., Co-partners, Doing Business Under the Firm Name of Cotton Brothers & Company.

Request for a Substitute Justice.

To Hon. J. T. De Bolt:

Mr. Justice Alfred S. Hartwell being (*) disqualified to sit with us in the above entitled cause, we, the remaining Justices of the Supreme Court, hereby request and authorize you to sit with us and hear and determine the said cause.

Dated the 9th day of June, 1906.

(Signed) W. F. FREAR.
(Signed) A. A. WILDER.

Attest:
(Signed) J. A. THOMPSON, *Clerk.*

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*Unable through illness, etc., or disqualified.

Endorsed: Supreme Court Territory of Hawaii Territory of Hawaii by C. S. Holloway Supt. Public Works Territory of Hawaii *v.* E. J. Cotton, *et al.* co-partners doing business under the firm name of Cotton Brothers & Company. Request for a Substitute Justice. Filed June 9, 1906. J. A. Thompson, Clerk.

222 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Partners Under the Name of Cotton Bros. & Co.

Exceptions from Circuit Court, First Circuit.

Argued June 9, 1906; Decided July 10, 1906.

Frear, C. J., Wilder, J., and Circuit Judge De Bolt in Place of Hartwell, J.

Exception to verdict—statement as to time when taken.—A statement in a bill of exceptions that an exception to the verdict was taken at the time of its rendition is sufficient to show that it was taken in the presence of the jury and before its discharge.

Exceptions—should be incorporated in bill.—A statement in a bill of exceptions to the effect that various exceptions were taken during the trial as will appear by the transcript, when made, of the stenographer's notes, is insufficient. The exceptions should be set forth in the bill itself.

Bill of exceptions—amendment of.—A bill of exceptions cannot be amended by inserting additional exceptions in it after the time prescribed by statute for the incorporation of exceptions in a bill and the presentation thereof to the judge.

223 *Opinion of the Court by Frear, C. J.*

The defendants moved for a new trial in the circuit court and, for the purpose of saving their rights as they contend, filed also a short bill of exceptions referring for most of the exceptions to the transcript of the stenographer's notes, which had not then been prepared, and obtained an extension of time until ten days after filing the transcript in which to file a further bill of exceptions specifying all exceptions shown by the transcript to have been taken and allowed. The motion for a new trial, however, was granted, several terms afterward, and therefore the defendants, thinking that they would not need the bill of exceptions, did nothing further in regard to it until recently when the order granting a new trial was reversed by this court on error brought by the plaintiff. See decisions *ante*, pp. 374, 445. They then moved the lower court, at the sixth term and nearly two years after the bill was filed, for leave to amend the bill of exceptions, which motion was granted and the bill, as amended extensively, was allowed. The plaintiff now moves in this court to dismiss

the bill so allowed on eight grounds, which it condenses in its brief into three, each of which will be considered.

1. "That the original bill of exceptions was not presented to the trial judge within the time prescribed by law." The time prescribed is twenty days after final judgment or such further time as may be allowed. R. L., Sec. 1864. The verdict was rendered May 27, 1904, judgment was entered June 7, 1904, the bill was filed June 8, 1904, and the evidence, particularly the testimony and affidavits of the trial judge and the defendants' attorney, show clearly that it was presented to the judge by the attorney probably on that date but at any rate before June 15, and therefore within the prescribed time.

2. "That neither by incorporation nor reference are the
224 record, pleadings, exhibits, transcript or judgment made a part of the original bill of exceptions." The bill states that "the pleadings, exhibits and transcript of the record are hereby referred to and made part of this bill of exceptions." If the words "transcript of the record," in this statement may be construed "transcript of the evidence," as we think it properly may be, the statement is sufficient at least in so far as the exception to the verdict is concerned, which alone need be considered, as will presently appear. If the statement were not sufficient it perhaps would be amendable so as to be made sufficient, as it is in the amended bill now before us, under the decisions in Magoon *v.* Ahmi, 11 Haw. 233, and Kapiolani Estate *v.* Thurston, 16 Haw. 147. No question is raised by the plaintiff as to whether the transcript, not being actually attached to the bill, is sufficiently identified. See Aylett *v.* Keaweamahi, 8 Haw. 320.

3. "That the original bill of exceptions does not contain any legal, valid or proper exception." The exceptions, as set forth in the bill, are divided into two classes, namely, the exception to the verdict, which is covered by one statement, and all other exceptions, which are covered by another statement. The statement in regard to the exception to the verdict is substantially the same in both the original bill and the amended bill and reads as follows: "At the time of the rendition of said verdict, to wit, May 26 (27), A. D. 1904, the defendants excepted to the verdict as contrary to law and the evidence." The objection now made to this is that it does not appear from the bill that this exception was taken, as is claimed to be required by practice or rule of court, in the presence of the jury and before the jury was discharged. In our opinion this does appear from the statement in the bill that the exception was taken at *time* time of the rendition of the verdict.

The statement in the bill in regard to the other exceptions is as follows: "During the trial of the cause certain exceptions
225 were taken by the defendants to rulings of the Court upon evidence, and also to the giving of certain instructions at the plaintiff's request, as well as to the refusal to give certain instructions requested by the defendants, or to giving the same in a modified form; all of which said exceptions were duly taken and allowed and appear on the transcript of the record made from the stenographer's

notes at the trial." This when condensed is simply a statement that during the trial certain exceptions were taken and allowed, as will appear by the transcript, when made, of the stenographer's notes, and, as repeatedly held, does not amount to a statement or incorporation of the exceptions in the bill. See Arruda *v.* Morton, *ante* 126, and cases there cited. A bill cannot be amended by incorporating therein new exceptions after the time prescribed by statute even though it may be amended so as to make exceptions already incorporated therein available. Kapiolani Estate *v.* Thurston, *supra.* The time allowed by the statute above cited for incorporating exceptions in the bill, as well as for presentation of the bill to the trial judge, is twenty days after final judgment or such further time as may be allowed. In this case, as already shown, further time was allowed until ten days after the filing of the transcript, but no attempt to amend was made within that time. Afterwards time for filing a bill was extended by the judge in pursuance of a stipulation of the parties until ten days after the decision of the court on the motion for a new trial. That time also elapsed without any attempt to amend the bill. It is true, as contended by the defendants, that the motion to amend the bill was made within ten days after this court's reversal of the order for a new trial, but, as we construe the stipulation and order for the extension of time within which to file a bill of exceptions, they referred to the decision of the trial court upon the motion for a new trial and not to the decision of this court reversing that decision. We hold, therefore, that the bill was not amendable, at the time an attempt was made to amend it, so
226 as to have incorporated in it the exceptions other than that taken to the verdict.

The result is that the exceptions other than that to the verdict cannot be considered, but that, since the exception to the verdict can be considered, the motion to dismiss the bill must be denied, and it is so ordered.

(Signed) W. F. FREAR.
(Signed) A. A. WILDER.
(Signed) J. T. DE BOLT.

E. C. Peters, Attorney General, for plaintiff.

S. H. Derby (Kinney, McClanahan & Derby on the brief) for defendants.

Endorsed: Supreme Court Territory of Hawaii. Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works *v.* E. J. Cotton, C. E. Cotton and James B. Agassiz, partners under the name of Cotton Bros. & Co. Decision on Motion to Dismiss Defendants' Bill of Exceptions. Filed July 10, 1906. J. A. Thompson, Clerk.

227 This contract and agreement made and entered into this 10th day of January, A. D. 1902, by and between the Department of Public Works of the Territory of Hawaii, acting in its representative capacity by and through its Superintendent of Public Works, James H. Boyd, who is duly authorized, the party of the first

part, and E. J. Cotton, C. E. Cotton and James B. Agassiz, copartners doing business at Honolulu, Oahu, said Territory, under the firm name of Cotton Brothers & Company, parties of the second part, Witnesseth:

That in consideration of the said party of the second part having the use of the government suction dredge and plant, to consist of the suction dredge and all machinery, pumps, pipes, pontoons, discharge pipes, ball joints, rubber connections, drill scows and machinery for same, and also machinery for connecting the same, that the Government now has on hand, for the term of one year from the date of signing these presents, the said parties of the second part agree to make complete repairs to the said dredge, its machinery and drill scows, in a sum of not less than Ten Thousand Dollars ($10,000), and on completion of the said repairs the same to be inspected by James H. Boyd, Superintendent of Public Works, for his approval and acceptance. And the said parties of the second part also agree to return said dredge and machinery on or before twelve (12) months from the date of this agreement.

And for the consideration aforesaid, the said party of the first part hereby agrees with the said parties of the second part to let them have the use of the said dredge, machinery, pumps, pipes, pontoons, discharge pipes, ball joints, rubber connections, drill scows and machinery for same, and also machinery for connecting the same, that the Government has now on hand, for the term of one year
228 from the date of signing these presents.

And in consideration of these presents, the said parties of the second part hereby agree to keep insured the said dredge, its machinery and drill scows, against loss or damage by fire in a sum of not less than $20,000, the same in case of loss to be applied to repairs to said dredge and machinery, or turned over to the said party of the first part, at their option; and they also agree to furnish unto the said party of the first part a satisfactory bond in a sum of Ten Thousand Dollars ($10,000), to ensure the return of said dredge and machinery in good working order, reasonable wear and tear excepted. On return of the said dredge at the completion of the said term, the party of the first part to accept the same if in good working order, reasonable wear and tear excepted. Any question arising under the acceptance of the dredge at the expiration of the term above noted, to be settled by a board of arbitration of three members, one to be chosen by each of the parties hereto, and the third to be chosen by the two arbitrators already chosen as aforesaid. And it is mutually agreed that the judgment of the said arbitrators shall be final, conclusive and binding.

In witness whereof said party of the first part, acting in its representative capacity by its Superintendent of Public Works, has caused these presents to be duly signed and subscribed, and the seal of the Department of Public Works to be attached by James H. Boyd, the Superintendent of Public Works, who is duly authorized, and who hereunto sets his hand as and for the act of said party of the first part, and the said parties of the second part have caused their firm

name to be hereunto subscribed by James B. Agassiz, who is duly authorized, the day and year first above mentioned.

(Signed) J. H. BOYD,
[SEAL.] *Sup'd't of Public Works.*

COTTON BROS. & CO.,
(S'g'd) By JAS. B. AGASSIZ.

229 TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 10th day of January, A. D. 1902 personally appeared before me James H. Boyd, Superintendent of Public Works of the Territory of Hawaii, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he, acting for and on behalf of the Territory of Hawaii, executed the same freely and voluntarily and for the uses and purposes therein set forth, and affixed the common seal of the Department of the Superintendent of Public Works of the Territory of Hawaii thereto.

(Signed) JNO. M. KEA,
Notary Public, First Judicial Circuit, Hawaiian Islands. [SEAL.]

TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 10th day of January, 1902, personally appeared before me James B. Agassiz, to me known to be the person described in and who executed the foregoing instrument as the act of the partnership of Cotton Brothers & Company, who acknowledged to me that he was duly authorized to execute the same, and that he did so freely and voluntarily, for the uses and purposes therein set forth, and as the free act and deed of the said copartnership.

(Signed) F. T. MERRY,
Notary Public, First Judicial Circuit. [SEAL.]

Endorsed: Agreement. Department of Public Works and Cotton Bros. & Co. In Circuit Court First Circuit. Territory of Hawaii, By C. S. Holloway, Supt. of Pub. Works *vs.* Cotton Bros. and Co. Rec'd in evidence May 23, 1904, Plaintiff's Exhibit "A," Wm. R. Sims, Clerk.

230 (Copy.)

Inventory of Government Suction Dredge.

1. 1 Digging Engine, complete.
2. 1 pair Swinging and Hoisting Engines-gearing and friction complete.
3. 1 Dynamo and Engine—complete.
4. 1 Compound Engine—24″ stroke, 15″ high, 30″ low press.
   2 sets Connection Rod Brasses.

5. 2 Boilers, 6′ x 16′, with Steam Drums and Fittings—complete.
6. 1 6′ Condenser. New Tubes throughout.
7. 1 Circulating Pump, 5″ discharge.
8. 1 Blake Vacuum Pump.
9. 1 Large Davison Bilge Pump.
10. 1 Small Davison Bilge Pump.
12. 1 10 H. P. Locomotive Boiler—complete.
13. 2 Blake Boiler Feed pumps—new.
14. 2 Hand Bilge Pumps.
15. 2 500 gallon Feed Tanks.
16. 1 coil 1¼″ Water-proof Wire Cable—new.
17. 1 coil Holding 1¼″ Wire Cable—old.
18. 1 Steam Gauge, 2 Vacuum Gauges, 1 Indicator,—Engine Room.
19. 1 10 gallon Oil Filter and Receiver.
20. 2 750 lb. Anchors.
    1 1000 lb. Anchor.
    1 1000 lb. Anchor—no stock.
21. 41 fathoms 1¼″ Anchor Chain.
22. 1 Portable Forge.
23. 1 Anvil.
24. 3 Rubber Connections—new.
25. 100 ft. 1½″ Hose—old.
26. 1 3 ton Differential Pulley.
27. 1 2 ton Differential Pulley.
28. 1 21 ft. Shore Boat, 5 ft. beam.
29. 1 18 ft. Shore Boat, 6 ft. beam.
30. 1 15 ft. Shore Boat, 4 ft. beam.

231 31. 1 Anchor Scow, with hand winch rigged on same.

32. 1 Ladder Frame.
33. 60 ft. Main Shafting.
34. 2 Truss Bearings for Main shaft.
35. 1 Bridle Shaft and Brackets—2 sets Nuts.
36. 2 20″ Cast Iron Elbows for Swivel connections of Suction.
37. 1 Cage—new. Cutters and Knives—complete.
38. 26 Pontoons.
39. Pipe.
    423′ 14″ Cast Iron Pipe on Pontoons.
    252′ 14″ " " " ashore.
    24′ 16″ " " " "
    28′ 18″ " " " "
    127′ 16″ Wooden Pipe.
    4 14″ Cast Iron Bends.
    2 16″ " " "
    40′ 15″ Wrought Iron Pipe.
40. Dredger Hull, 40 x 100 x 9′.

Drill Scows.

1. 2 Drill Scows.
2. 5 6 H. P. Engines.
3. 2 Blake Pumps, 4½ x 3¾ x 6.

4. 1 Boiler, 30″ x 10′.
5. 6 Sleeves.
6. 6 Shafts with couplings and 5 brackets.
7. 6 Sets Bevel Gears for Sleeves.
8. 6 pieces Hydraulic Pipe, 1¼″ x 28′.
9. 6 Drill Heads with pipe and connections for 3 Drills.
10. 2 Brass Swivel Cocks.
11. 6 Hangers.
12. 2 Wrenches.
13. 1 dozen Bits.
14. All 16″ Cast Iron Pipe owned by the Government that may be required by Cotton Brothers & Company, same to be delivered by Superintendent of Public Works on six (6) days' written notice by Cotton Brothers & Company.

232 Endorsed: Bond. Cotton Bros. & Co. and —— to James H. Boyd, Superintendent of Public Works. In Circuit Court First Circuit. Territory of Hawaii by Supt. Pub. Works C. S. Holloway *v.* Cotton Bros. & Co. Rec'd in evidence May 23rd 1904. Plaintiff's Exhibit "C." Wm. R. Sims, Clerk.

233 DEPARTMENT OF PUBLIC WORKS,
HONOLULU, T. OF H., *April* 25, 1903. *190–*.

Messrs. Cotton Bros., Honolulu, T. H.

GENTLEMEN: The following Dredger Materials have been received and accepted by the Department of Public Works, viz:

Pipe:

590 ft.—14″ Cast Iron, missing 90 feet.
1842 ft.—16″ " " O. K.
51 ft.—18″ " " O. K.
6 Cast Iron Bends O. K.
230 ft. Wooden Pipe O. K.

Dredger:

1 pair of Digging Engines complete in Govt. Warehouse.
1 cage and knives in Govt. Warehouse.

Shore Boats:

1 shore boat 15 ft.
1 " " 20 ft.
1 " " 16 ft. all in good condition.

Spuds:

2—50 ft. spuds with yokes and points in Govt. Yard.
Dredger Hull and balance of machinery lost.

Pontoons:

22 Pontoons.

Yours very truly,
(Signed) MARSTON CAMPBELL,
Ass't Sup't Public Works.

Endorsed: Circuit Court First Circuit. Ter. of Hawaii by C. S. Holloway Sup't Pub. Works *v.* Cotton Bros. & Co. Rec'd in evidence May 24, 1904. Defendant Exhibit "2." Wm. R. Sims, Clerk.

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DEPARTMENT OF PUBLIC WORKS,
HONOLULU, T. OF H., *April* 29, 1903. *190–.*

Messrs. Cotton Bros. & Co., Honolulu, T. H.

GENTLEMEN: Two (2) drill scows have been accepted by the Government. One in complete order for work, the other dismantled with all machinery in good condition.

Very truly yours,
(Signed) MARSTON CAMPBELL,
Ass't Sup't of Public Works.

Endorsed: Circuit Court First Circuit. Territory of Hawaii by C. S. Holloway, Supt. Pub. Wks. *v.* Cotton Bros. & Co. Received in evidence May 24, 1904. Defendant's Exhibit "3" Wm. R. Sims, Clerk.

235 E. J. Cotton. J. B. Agassiz. C. E. Cotton.

Cotton Bros. & Co.,
Bridge Builders and General Contractors,
Engineers and Builders
of all Kinds of
Bridge Work, Pile Driving, and Wharves,
Cor. Tenth and Washington Sts.,
Oakland, Cal.
Honolulu Office:
Room 3, Brewer Building.

HONOLULU, H. I., *May 4th/02.*

Cotton Bros. & Co., Honolulu, H. T.

GENTLEMEN: Upon the report of the Assistant Superintendent of Public Works that the repairs on the Government Dredge, under an agreement dated Jan. 10th/02 has been satisfactorily performed and further that more than $10,000.00 has been expended on the work and to notify you that I hereby approve and accept the same.

Yours truly,
(Signed) JAS. H. BOYD,
Sup't of Public Works.

Endorsed: In Circuit Court First Circuit. Territory of Hawaii by C. S. Holloway Supt. Pub. Wks. *v.* Cotton Bros. & Co. Rec'd in evidence May 24, 1904. Defendant's Exhibit "4." Wm. R. Sims, Clerk.

236–484 *Dredger Stuff Returned.*

			If used on dredger.		App'x am't sold for.
*500 ft. 14″ cast iron pipe 102.4 lbs. per ft.....	51200 lbs.				
*1842 " 16″ " " " 124.7 " " "	229697				
*51 " 18″ " " "	7599				
	288,496	2½	7212	2	5769
*6 cast iron bends		15.00	90	10	60
*230 lin. ft. wooden pipe at.....		.75	172.50	.50	115
*1 pair digging engines.....		.....	1200	.....	800
*1 cage & knives.....		.....	1700	.....	1000
*1 shore boat 15 ft.....		.....	50	.....	50
Campbell refers to his report to Cooke.					
*1 " " 20 "		.....	40	.....	40
*1 " " 16 "		.....	55	.....	55
*2 50 ft. spuds with yokes & points @ 200 each.....		.....	400	.....	400
*22 pontoons 2 taken to P. H.....		75.00	1650	50.	1100
*2 drill scows.....		.....	1500	.....	1500
			14069	.....	10889

* Not taken.

Endorsed: In Circuit Court First Circuit Territory of Hawaii by C. S. Holloway Supt. Public Works *v.* Cotton Bros. & Co. Rec'd in evidence May 25 1904 Defendants' Exhibit "6." Wm. R. Sims, Clerk.

* * * * * * *

485 In the Circuit Court of the First Circuit, Territory of Hawaii, April, 1904, Term.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Co., Defendants.

Proposed Instructions for Plaintiff.

Instruction No. 1.

I instruct you, Gentlemen of the Jury, that this is an action brought in the name of the Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works, against the defendants, for damages in the sum of $25,000.00, for the failure, by defendants, to return to the plaintiff a certain dredge theretofore delivered by plaintiff to defendants under contract dated the 10th day of January, 1902.

Given. Gear, J.

Instruction No. 2.

I instruct you, Gentlemen of the Jury, to find a verdict for plaintiff in the sum of $25,000.00.

Refused. Gear, J.

486 Instruction No. 3.

It is admitted by defendants that at all times during the month of January, A. D. 1902, James H. Boyd was the duly qualified and acting Superintendent of Public Works of the Territory of Hawaii. That on the 6th day of December, 1902, Henry E. Cooper became Superintendent of Public Works of the Territory of Hawaii, and so continued until the 22nd day of November, 1903. That on the 22nd day of November, 1903, C. S. Holloway was duly appointed Superintendent of Public Works of the Territory of Hawaii, and ever since has been and now is the duly qualified and acting Superintendent of Public Works of said Territory.

Given. Gear, J.

Instruction No. 4.

It is further admitted by defendants that on the 10th day of January, 1902, E. J. Cotton, C. E. Cotton and James B. Agassiz, the defendants herein, were doing business as co-partners in Honolulu and in the Territory of Hawaii under the firm name and style of Cotton Brothers & Co., as contractors, and ever since said time have been and now are co-partners as aforesaid, and doing business as aforesaid.

Given. Gear, J.

Instruction No. 5.

It is further admitted by defendants that on the 10th day of January, 1902, the Territory of Hawaii was the owner of a certain suction dredge or dredger together with its appurtenances then located and used within the harbor of Honolulu. That said dredge or dredger consisted of certain machinery for taking the sand, soil or debris from harbors below water, on which a certain scow supporting said dredge might float. That the said

Given. Gear, J. scow and machinery thereon constituting said dredge had no means of self-propulsion, but was entirely dependent upon means other than its own propulsion

487 to be towed from place to place. That said dredge had never been used outside of the harbor of Honolulu.

Instruction No. 6.

It is further admitted by defendants that on the 10th day of January 1902, the plaintiff and defendants made and entered into a written contract whereby the defendants hired

Given. Gear, J. from the plaintiff dredge, together with its appurtenances, to be used by the defendants from January 10, 1902 to January 10, 1903.

Instruction No. 7.

It is further admitted by defendants that they promised by the contract of January 10, 1902, to take due care of the suction dredge and all machinery, pumps, pipes, pontoons,

Given. Gear, J. discharge pipes, ball joints, rubber connections, drill scows and machinery for the same, and also all machinery for connecting the same, that the Territory had on hand on January 10, 1902.

Instruction No. 8.

It is further admitted by defendants that by the contract that defendant agrees to return the dredge to the Superintendent of Public Works of the Territory of Hawaii on or before

Given. Gear, J. January 10, 1903, in good working order, reasonable wear and tear excepted.

Instruction No. 9.

It is further admitted by defendants that under the contract they took into their possession control and use the

Given. Gear, J. property described in the contract.

Instruction No. 10.

It is further admitted by defendants that the Territory of Hawaii did, by Henry E. Cooper, Superintendent of

Given. Gear, J. Public Works, subsequent to the 10th day of January, 1903, make a demand upon the de-

488 fendants for the return of the dredge, but said demand was refused and the dredge was not nor ever has been returned to the Territory of Hawaii.

Instruction No. 11.

I instruct you, Gentlemen of the Jury, that where one person hires an article of another, he is bound to exercise ordinary care in its use. Such care as a reasonably careful and prudent man would use in relation to his own property. And the defendants in this case were bound to be reasonably careful and prudent in their use of the dredger which they hired of the plaintiff under the contract of January 10, 1902. And I instruct you that if you find by a preponderance of evidence that the defendants did not exercise reasonably due care and caution in their use of the government's dredge and that by reason thereof the dredge was lost and never returned by the defendants to plaintiff, then I charge you that the defendants are liable for the loss of the dredger in such amount as you determine the dredger to have been worth at the time of her loss.

Given. Gear, J.

Instruction No. 12.

In determining the question of whether or not defendants were negligent in their care of the dredge, you should take into consideration all the facts and circumstances of the case, the character of the dredge, her seagoing qualities, the place where she was being used when lost and the men who had her in charge at the time of her loss, and if you find by a preponderance of evidence that the placing of the scow upon the bar at the entrance of the channel leading to the mouth of Pearl Harbor was not such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances, then I charge you Gentlemen of the Jury that the defendants were guilty of negligence in placing the dredge in that position.

Modification inserted.

Given as modified. Gear, J.

489 Instruction No. 13.

I charge you, Gentlemen of the Jury, that it is the undisputed evidence in this case that the value of the dredge at the time she was lost was $25,000.00, and if you find by a preponderance of the evidence that the defendants were guilty of negligence in any regard, which was the proximate cause of the loss of the dredge, your verdict should be for the plaintiff in the sum of $25,000.00.

Withdrawn by plaintiff.

Instruction No. 14.

I charge you, Gentlemen of the Jury, that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It does not consist

alone in the greater number of witnesses, and it does not necessarily follow that a plaintiff has failed to establish his case by a preponderance of proof because he has testified to a state of facts which are denied by the testimony of the defendants. In such a case in arriving at the truth, you have a right to take into consideration every fact and circumstances proven on the trial and determine from those circumstances upon which side is the weight or preponderance of the evidence. This preponderance of the evidence can be occasioned by other means than simply the testimony of witnesses on one side testifying to a particular state of facts. If, during the progress of the trial, witnesses on one side testify to the same state of facts as testified to by witnesses on the other side, you may consider that evidence in determining upon which side lies the preponderance of the evidence.

Given. Gear, J.

Instruction No. 15.

One of the defenses in this case, Gentlemen, is one of inevitable accident, in other words the loss of the dredge was occasioned by a cause not of human origin and not controllable by human power. But in order that the approximate cause of the loss be considered inevitable accident, it is not enough to show that under circumstances existing at the time of the accident it could not have been avoided. It must also be the fact that the defendants were not guilty of any negligence which brought about any of those circumstances. For if you find by the preponderance of the evidence that the defendants, by previous negligence on their part, put the property of the plaintiff into circumstances of such difficulty or peril as to make it impossible for them to save that property under those circumstances, then the approximate cause of the loss is not inevitable accident, but the negligence of the defendant, and the defendants are liable for the loss.

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Given. Gear, J.

By the COURT:

In this connection the court instructs you that to entitle plaintiff to recover in this suit, it must appear from the evidence that the injury complained of was occasioned by the want of attention carelessness or negligence on the part of defendants and was not simply the result of an accident; and if you believe from the evidence, that the injury resulted from an accident which could not have been foreseen or guarded against by the exercise of ordinary and reasonable care and prudence, on the part of defendants, then plaintiff cannot recover and you should find for defendants.

Instruction No. 16.

I further instruct you gentlemen of the jury that if you find from the evidence that the defendants were guilty of negligence in their care of the property of the plaintiff it will be necessary for you to consider the amount of damages if any to which they are entitled. The measure of damages in this case if just

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compensation in money for the property lost or destroyed; such an amount as will fully restore the loser to the same property status that it occupied before the loss or destruction. To arrive at the amount of such compensation it is necessary to arrive at the value of the property destroyed. And in ascertaining its value you are to take into consideration all pertinent facts provided upon the trial which tend to establish its real and actual value at the time of its loss or destruction. And to this end you may take into consideration the original market cost of the property; the manner in which it has been used; cost of repairs if any; its general condition and quality and all the facts and circumstances relating thereto.

Given. Gear, J.

[I instruct you further that in ascertaining the value of the dredge, you are not to take into consideration the value of the property delivered to the Territory by the defendants prior to the time that they took the dredge to Pearl Harbor.]*

Endorsed: L. 5602. Proposed Instructions of Plaintiff.

492 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,

v.

C. E. COTTON, E. J. COTTON, and JAMES B. AGASSIZ, Partners under the Name of Cotton Brothers & Company.

Exceptions from Circuit Court, First Circuit.

Submitted July 30, 1906; Decided September 7, 1906.

Frear, C. J., Wilder, J., and Circuit Judge De Bolt in Place of Hartwell, J.

Verdict—held supported by evidence.—A verdict for $25,000 for the loss of a dredger through the alleged negligence of the defendants, who hired her from the plaintiff in the harbor of Honolulu and after using her there took her to the bar at the entrance to Pearl Harbor, where she was lost, is held supported by the evidence.

Trial judge's opinion—that verdict is contrary to evidence, what weight to be given to.—An opinion expressed by the trial judge that the verdict is against the evidence—in this case on the question of negligence—is not conclusive. In this instance it was expressed in a ruling that was set aside as beyond his jurisdiction, but, assuming that some weight might nevertheless properly be given to it, it cannot control in view
493 of the inadequacy of the reasons given for it by the trial judge and the clear adequacy of the evidence to support the verdict.

[*Matter enclosed in brackets erased in pencil in copy.]

Estoppel—none by consent upon condition when condition not performed.—Consent, if given, by the plaintiff to the defendants to take the dredger to Pearl Harbor upon condition that the latter should give an adequate bond for her safety, which condition was not performed, would not estop the former from recovering damages for the latter's negligence in taking her there, if that were negligence.

Id.—none by mere knowledge and silence, when.—The plaintiff would not be estopped by the mere knowledge of its assistant superintendent of public works that the defendants were to take or had taken the dredger to Pearl Harbor, if that were negligence, and his failure to object—it not appearing what authority he had in the matter or what knowledge he had as to the rights of the defendants, and the latter, who had dealt with the superintendent of public works, having full knowledge of the extent of their rights.

Id.—none by consent to use without specifying place of use, when.—Consent, by contract, to the use of a dredger for specified time without specifying the place of use, does not necessarily permit its use in any place however remote or dangerous.

Id.—consent to do a thing is not consent to do it negligently.—Consent, if given, to take the dredger to Pearl Harbor and use her there would not estop the plaintiff from recovering damages for the defendants' negligence, if any, in placing or keeping her there under dangerous conditions.

494 Negligence—preponderance of evidence, proximate cause, failure to provide against contingencies.—Evidence tending to show that the defendants kept the dredger without proper protection where she was liable to be swamped in rough weather and that she was swamped in such weather, is sufficient to support a verdict that she was lost through the negligence of the defendants, even if there was no evidence of any special negligence during the last two hours before she sank and even if it was not negligence to place and use the dredger there in calm weather and there was no available means of taking her to a place of safety after rough weather arose, the defendants having failed to provide such means.

Hypothetical question—form of.—A nautical expert may properly be asked whether it would be "safe or prudent" to moor a dredger as described. It is not necessary to ask instead whether such mooring would be such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances.

Value—evidence of, at time of loss.—Evidence that the value of the dredger was $45,000 only eight months before she was lost and that during that time she had been used only in a quiet harbor and that she was then considered in sufficiently good order to be taken without further repairs for extensive use on a rough bar, would be sufficient to support a finding that she was worth $25,000 at the time she was lost—but there was direct evidence tending to show that she was worth that then.

495 *Opinion of the Court by Frear, C. J.*

This is an action for $25,000 for the loss of a dredger through the negligence of the defendants. The plaintiff obtained a verdict for the amount claimed and the defendants bring exceptions to this court. The principal exception is that taken to the verdict as contrary to the law and the evidence, and this is the only one that can be considered. See decision on motion to dismiss the bill of exceptions, *ante*, p. —.

The theory of the plaintiff is that the dredger was swamped in consequence of being put or left in a dangerous position through the negligence of the defendants. The defendants contend that no negligence on their part was shown, that if there was any negligence the plaintiff is estopped by its consent or acquiescence from setting it up, and that the evidence does not show so great a loss as $25,000.

The dredger consisted of a rectangular flat-bottom scow 40 x 100 feet with a ladder extending in front 75 feet, and with the necessary machinery. She drew 6 or 7 feet of water. Her machinery was covered by a house made of 1 x 7 inch tongue and groove built 9 feet high on a coping six inches thick by sixteen inches high on the deck. The house had a pair of sliding doors 12 feet wide at the stern, and smaller sliding doors on the sides. It covered most of the deck, leaving spaces outside of it on the deck about 4 feet wide at the sides, six feet at the stern, eight feet at the bow to the ladder and fourteen feet on the sides of the ladder. The dredger was without means of self-propulsion.

By a contract made January 10, 1902, the plaintiff allowed the defendants the use of the dredger and appurtenances for one year upon their agreement to make complete repairs to the same in a sum of not less than $10,000, insure them for not less than $20,000 against loss or damage by fire and give a bond for $10,000 for their return in
good working order. The repairs were made soon afterwards
496 and from March to October the defendants used the dredger in the harbor of Honolulu. In July or August there was some talk, referred to more fully below, between Mr. Boyd, then superintendent of public works, who acted for the Territory in the matter, and the defendant Agassiz, who acted for the defendants, in regard to taking the dredger to the entrance of Pearl Harbor for use there before the expiration of the contract and also in regard to making another contract for continuing the use of the dredger there after the expiration of the contract already made. The defendants contemplated taking over from third parties a partially executed contract for dredging the bar at the entrance to Pearl Harbor. In September they took over that contract and on October 30 had the dredger towed from Honolulu harbor to a point off the entrance to Pearl Harbor by the Tug Fearless, and there, because the Fearless was too deep to cross the bar, delivered to the tug Kaena, which took her to a position about 900 feet from the outer edge of the bar and 1000 feet from the inner edge and about two miles from land, where she was moored with her bow pointing seaward in about fifteen feet of water (one

witness says 25 feet) by seven wire cables from 150 to 200 feet in length, which were made fast, some to dolphins consisting each of four posts 12 x 12 and some to anchors. The day on which she was taken to Pearl Harbor was specially calm—perhaps selected on that account for the purpose as one witness seemed to think. Early on the morning of the 19th day thereafter she sank. During that period she was unable to do any work, apparently because, as one witness testified, the water, though not particularly rough until the last three days, was too rough to take out from Pearl Harbor the pontoons, which were about 8 x 24 feet in size, and connect them and moor them in position. Eleven or twelve days before the dredger sank one of the scows 40 x 80 feet in size broke loose and went ashore.

497 On the Saturday before the Tuesday on which the dredger sank there was a strong wind, said to amount to half a gale, from the ocean and a heavy swell, estimated at from six to twelve feet in height. On Sunday it was rougher. That evening one of the cables parted but was spliced together the next day. On Monday it was rougher still and towards noon a post in one of the dolphins and two cables broke allowing the dredger to swing around 150 to 200 feet with her bow towards the leeward side of the channel and her stern out square against the waves. Two six-inch Manila cables were then brought from shore to replace the broken wire cables. On Tuesday morning between 2 and 2:30 o'clock the dredger sank in about 15 feet of water,—one witness says sixteen at low tide by measurement. She may have drifted or been washed, before or after she sank, several hundred yards from where she was moored last. Other facts will be stated as we proceed.

The defendants contend that much weight should be given to the opinion expressed by the trial judge that the verdict was contrary to the evidence on the question of negligence, notwithstanding that his order granting a new trial upon that ground was set aside by this court as made without jurisdiction. See decisions *ante*, pp. 374, 445. The question being whether this court should set aside the verdict and grant a new trial, it is not precisely the same as it would be if it were whether this court should set aside an order for a new trial made by a trial judge within his jurisdiction. But, assuming that some weight might well be given to an opinion expressed by a trial judge even under such circumstances, such opinion, of course would not be all-controlling, and in the present instance the reasoning of the trial judge, which is set forth at length, is so clearly insufficient to support his conclusions and the evidence is so clearly of a nature to be passed on by the jury, that the verdict must be sustained.

498 The defenses, although not thus stated by the defendants, are substantially (1) that the plaintiff is estopped, by its consent to or acquiescence in the defendants' taking the dredger to Pearl Harbor, from setting up negligence on their part, and (2) that there was no negligence on their part, or at least that, if there was any, it was not the proximate cause of the loss.

In support of the defense of estoppel it is contended in the first place that the then superintendent of public works, Mr. Boyd, gave

the defendants, through Mr. Agassiz, permission to take the dredger to Pearl Harbor. The only testimony upon this point is that of Mr. Boyd on one side and Mr. Agassiz on the other. Mr. Boyd in answer to the question, "Can you state whether or not permission was ever granted by you for them to take the dredger to Pearl Harbor," replied, "Not to my recollection." Mr. Agassiz testified, "My recollection is that he did give me permission to take the dredger to Pearl Harbor." It was for the jury to say whose recollection was the better. The remaining testimony of these witnesses upon this point tends to show, in large part at least, that Mr. Boyd, when requested by Mr. Agassiz for permission to take the dredger to Pearl Harbor, declined to make any agreement at that time although he expressed a willingness to enter into an agreement on certain terms at a future time. The plaintiff contends, and with much support from Mr. Boyd's testimony, that Mr. Boyd told Mr. Agassiz that he would not enter into any agreement until the defendants had taken over the contract for dredging Pearl Harbor bar, which would be after his return from the mainland, for which he was about to depart, and that then he would permit the dredger to be taken to Pearl Harbor only on condition that further security in the form of a bond should be given for her safety, and that he would agree to allow the use of the dredger to be continued there after the expiration of the contract already made for a rental of not to exceed $1000 a month. The defendants contend that permission was given to take the
499 dredger to Pearl Harbor immediately without any further bond being given, and that the talk in regard to a further bond related solely to the contemplated use of the dredger under the proposed new contract after the expiration of the contract already made, and in support of this view they rely particularly on the clauses which we italicize in the following passage from Mr. Boyd's testimony: "The reason rental was talked of at the time, I proposed the rental to them AS IT WAS BEING TAKEN OUT OF THE HARBOR OF HONOLULU, TAKEN DOWN TO WORK IN PEARL HARBOR, on which they called my attention to the contract, they had an unexpired term, between three and four months, and under that *contract on an unexpired term they had a right to the use of the dredger*, so in the conversation that IF THEY GAVE THE GOVERNMENT A GUARANTEE OF THE RETURN OF THE DREDGER, *just as in the former contract*, that the PERMISSION MAY BE GIVEN BY THE GOVERNMENT TO THEM TO TAKE THE DREDGER DOWN THERE, AND after the expiration of their term they were to pay a rental, I think it was $1000 a month." This passage is from the defendants' standpoint at best ambiguous, especially in view of the parts that we capitalize. Taking Mr. Boyd's testimony as a whole there is much to sustain the theory that he required an additional bond to be given upon taking the dredger to Pearl Harbor and for the reason that it was to be taken there, whether he thought it was to be taken there before or after the expiration of the contract already made. For instance, immediately after the passage just quoted Mr. Boyd testified: "After the expiration of the contract I was agreeable to it," that is, the rental of the dredger, "and also that upon being the contract," that is, to dredge

the Pearl Harbor bar, "being transferred to the Cotton Brothers, that the final agreement would be entered into with the government, in order to protect the government's property, that is, protect the dredger on its being taken out of the harbor to Pearl Harbor." A little earlier in his testimony he had said: Mr. Agassiz "asked
500 me if I had any objection to the dredger being taken down there. I said I had no objection provided a proper safeguard was made for protecting the government's property." The jury might well have found not only that no permission was given to take the dredger to Pearl Harbor, but also that the permission to be given at a future time was to be upon a condition as to the giving of a further bond, which was never complied with.

The defendants and the circuit judge seem to mistake a contemplated final agreement for a mere formal execution of a final agreement already made. Worse, they contend that even if the superintendent said that he would permit the dredger to be taken to Pearl Harbor only on condition that a further bond should be given for its safety, and even if that condition was not fulfilled, the plaintiff would be estopped from saying that using the dredger there was negligence, and they argue that it would not be any more negligent to use it there before permission was given to do so than it would be after that. They seem to confuse to some extent the idea of an estoppel on the part of the plaintiff from setting up negligence on the part of the defendants with the idea of absence of negligence as a matter of fact. If the plaintiff was willing that the defendants should use the dredger in a dangerous place or under dangerous conditions, provided the latter would assume the risk and provide for full compensation to the former in case of loss, the inference would be that the plaintiff considered that it would be negligent to use the dredger there rather than that it would not be negligent to do so, and such an agreement would not make that prudent on the part of the defendants which would otherwise be negligent in fact. Nor would willingness to make such an agreement work an estoppel. Otherwise, no one could set up as negligent anything whatever done to his property if he would be willing to have that done upon his being fully compensated or secured—which would be absurd.
501 If in such case the consent of the plaintiff would estop it from bringing an action on the case if the dredger were lost and confine it to its right of action on the contract or the bond, it is still beyond dispute that a proposed agreement or conditional consent of that kind would not estop it from bringing its action on the case if the defendants took the dredger and used it there without the agreement being made or without the performance of the condition imposed. Consent so conditioned would not be operative until performance of the condition.

The defendants contend next in support of the defense of estoppel that the plaintiff, through its superintendent, Mr. Boyd, or assistant superintendent, Mr. Campbell, had knowledge that the defendants took or were to take the dredger to Pearl Harbor and that that is sufficient to constitute an estoppel, or, as they and the circuit judge seem to think, is sufficient to take the character of negligence from

what would otherwise be negligence. There is nothing whatever to indicate that Mr. Boyd had such knowledge. On the contrary soon after his talk with Mr. Agassiz he left the Territory and apparently did not return until after the dredger sank. And as to Mr. Campbell, the only evidence is that Mr. Agassiz on one occasion when calling on Mr. Campbell, then a very sick man, at his home, casually remarked that, "We are nearly ready to take the dredger to Pearl Harbor," and that Mr. Campbell said nothing as to the safety of taking the dredger there. Mr. Agassiz also testified that Mr. Campbell knew that they were getting the dredger ready to take to Pearl Harbor, and that they had been for two or three weeks, although he does not state how Mr. Campbell knew this. The failure of a very sick assistant superintendent to raise objections to a friendly caller at his home to a mere casual remark as to what the caller was nearly ready to do could hardly operate as an estoppel against the Territory. It does not appear what authority, if any, Mr. Campbell had in the matter. He may have supposed either that Mr. Boyd had made arrangements for taking the dredger to
502 Pearl Harbor or that when Mr. Agassiz got ready to take her there he would before doing so first complete the conditional arrangements already made with Mr. Boyd. Mr. Agassiz knew as well as Mr. Campbell could have known the arrangements with Mr. Boyd and Mr. Campbell may not have known them at all. Certainly Mr. Agassiz was not seeking Mr. Campbell's consent as a basis for his action, nor had Mr. Campbell any reason to suppose that Mr. Agassiz would act on his silence. It is said further that Mr. Campbell must have known that the dredger was taken to Pearl Harbor after it was taken there and that he made no objections. If such knowledge can be inferred from the supposed publicity or notoriety of the act, it still would not follow that Mr. Campbell's failure to object would relieve the defendants. The latter had full knowledge of all the circumstances and were in a better position than Mr. Campbell to know whether they were acting rightly or not and they could not reasonably claim and do not claim that they were induced by the silence of that sick man, and it would be the same if he were well, to take the dredger to Pearl Harbor or to keep her there afterwards. They took their chances with full knowledge and cannot say that they were justified in performing negligent acts, if they did so, merely because Mr. Campbell did not follow them about and tell them they ought not to perform such acts.

It is contended further that since the original contract did not specify where the dredger was to be used the defendants had a right to use it at the entrance to Pearl Harbor, or at least that such was the law of the case whether right or wrong as given in de*de*fendants' requested instruction 3 as follows: "This agreement allowed the defendants 'the use of the government suction dredger' without confining the place of use to any particular locality. Using the dredger for dredging out the entrance of Pearl Harbor may be presumed to have been contemplated by both parties, consequently the
503 defendants are not necessarily chargeable with negligence by the mere fact of using the dredger at that place, whether

the plaintiff expressly agreed that it might be used there or not." As a matter of fact the jury might well have found that the parties did not contemplate the use of the dredger at the entrance to Pearl Harbor. The dredger was not a seagoing dredger and had always been used in the harbor of Honolulu, although she was once taken a short distance outside for a day or so, where she was found unserviceable because of the swell. She was hired by the defendants apparently with special reference to dredging a portion of that harbor, and the defendants themselves when they first contemplated using her at the entrance to Pearl Harbor six or seven months afterwards seemed to think that they required the permission of the superintendent of public works to do so. As Mr. Agassiz testified, he would not take over the Pearl Harbor "job until I got permission to use the dredger on Pearl Harbor. * * * I didn't expect to take it down there without getting permission from Mr. Boyd or some one else in authority; I was not going to sneak the dredger out of the harbor." The instruction of the court must be construed as laying down a rebuttable and not a conclusive presumption as to the use of the dredger at Pearl Harbor. Such construction is perhaps required in order to harmonize the instruction with other instructions that were given. Moreover, the trial judge could hardly have intended to go to the ridiculous extent of saying that because the contract did not expressly confine her place of use to any particular locality the dredger could be used anywhere else however remote or however dangerous the conditions, and he expressly refused to give the instruction in its original form as requested by the defendants, which might have made the presumption conclusive, and modified it by inserting the word "necessarily," which shows that he intended the presumption to be rebuttable. One of the defendants' exceptions was taken to this modification. The plaintiff offered to show a contemporary oral agreement that the dredger was to be used in the harbor of Honolulu only, but this was excluded.

504 But let us assume that the defendants had a right under their original contract to take the dredger to Pearl Harbor and use her there or, if not, that it was not negligence even if it were a breach of contract to take and use her there, or that the plaintiff through its officers not only knew that the dredger was to be taken or was taken there but even expressly consented and that unconditionally that she might be taken and used there. Still, there would be no estoppel except as to taking and using her there. There would be no estoppel against setting up negligence in keeping her on the bar in an unprotected condition during rough weather. Permission to take and use her there would not include permission to do so negligently. For instance, permission to take her there would not estop the plaintiff from setting up negligence or claiming damages if she had been lost in an attempt by the defendants to take her there in a severe storm. No more would there be an estoppel by reason of permission to use her there, if she were lost through their negligence in improperly mooring her or in not protecting her by necessary bulkheads or copings or in keeping her there in a severe

storm. The defendants contend that she was properly moored there and as to that the plaintiff raises no question. The main question is whether it was negligence to keep her where she was under the stormy conditions that prevailed when she was lost. It does not follow that, as contended, because there was no negligence in mooring her as she was moored and in the place where she was moored and in calm weather on October 30, it was safe and prudent to allow her to remain there during a gradually increasing wind and swell from the ocean. The defendants take the strange position that if it was safe and prudent to place the dredger where she was at the time and under the conditions then prevailing no negligence can be imputed to them for leaving her there under changed conditions because they had no available means of removing her from
505 that position—the tug Fearless being too large to cross the bar, the tug Kaena being too small to handle the dredger in weather that was at all rough, there being no other available tug capable of taking the dredger into Pearl Harbor in rough weather, and it being unsafe for the Fearless to take her in such weather back to Honolulu Harbor. This is an argument that it would not be negligence to place the dredger in a position that might reasonably be expected to become dangerous at any time, without providing also the means for removing her from that position and taking her to a place of safety when the danger should arise. The jury were instructed in substance that if the defendants negligently put the property into circumstances of such difficulty or peril as to make it impossible for them to save her under those circumstances the defendants would be liable. See plaintiff's requested instruction 15. The point, however, which we wish to make now is that the defendants' right, if they had a right, whatever its source, or the plaintiff's permission, to take the dredger to the entrance of Pearl Harbor or use her there would not include a right or permission to keep her there under dangerous conditions. We shall now proceed to consider whether the evidence was sufficient to justify a finding that it was negligence to keep the dredger where she was and under the conditions existing at the time she sank, and whether that negligence, if there was any, was the proximate cause of the loss.

The defendants contend that there was no negligence in keeping the dredger there and that the loss was not due to such negligence, if there was any, but was due to possible unknown causes, which they contend the plaintiff should have negatived or excluded, or to defects in the construction of the dredger. It is true that no evidence was produced to show what took place between midnight and the time, a little more than two hours later, when the dredger sank; that the burden was on the plaintiff to show negligence on the part of the defendants; that it could not be presumed in the absence of evidence that the defendants were negligent during that
506 time; and that the dredger, so far as the evidence shows, was in good condition and practically free from water at midnight. But it was unnecessary to show any special negligence during those two hours, and, indeed, it is difficult to imagine what the defendants could have done during that period or neglected to do

which would have made any difference in the result if the loss was caused, as apparently it must have been, through the water coming over the dredger or into her from the bottom. The negligence, if any, was in placing the dredger there without providing means of taking her to a place of safety in case of danger or in keeping her there without adequate protection in time of danger. If such negligence was shown, and especially if it was supplemented by evidence tending to show that the dredger was swamped by water coming over her, that might well be considered the proximate cause of the loss until some other sufficient intervening cause should be shown. It was not incumbent on the plaintiff to show beyond a reasonable doubt that the water did not come through the bottom owing to some latent defect in the dredger. It was sufficient to show by a preponderance of evidence that it came over the stern in consequence of the dredger having been left in a dangerous position.

The defendants attempted to show that the loss was caused or might have been caused by defects in the dredger herself which were unknown to the defendants. The only evidence tending in this direction consists of the testimony of Captain Scott of the Kaena to the effect that on the morning before the dredger sank, when he happened to go aboard her, there was shaking and the brick work about the boilers was opening and shutting about four inches, and that after the dredger sank he brought up a plank that came out of her deck. The evidence as to the plank is in itself of no significance, for not only did that come out of the deck and not out of the bottom but it came out after the dredger sank, and according to the testimony of Mr. Agassiz the upper part of the dredger began to
507 break up under the action of the waves almost immediately after she sank. As to the brick work, the testimony of this witness might well have been disbelieved by the jury. Taken as a whole it does not make a favorable impression. The fact, if it was a fact, that the brick work was opening and shutting four inches was perhaps the most significant fact that the defendants could rely upon, and yet not one of their other witnesses alludes to it excepting Mr. Agassiz, who says he never heard of it until shortly before the trial—a year and a half after the dredger sank. Even the foreman of the dredger, Haggart, whose attention Captain Scott says he called to the condition of the brick work at the time, says nothing about it. Other things, such as the breaking of the cable, were reported to Mr. Agassiz, and yet this, which, if true, was most important of all, was not reported to him, nor was any attention paid to it by any one so far as appears, although a number must have noticed it and realized the dangerous condition of the dredger which it indicated if it were a fact. Captain Scott, indeed, goes so far as to say substantially that that indicated to him that the dredger was breaking up, and that he knew pretty well when a vessel was breaking up—and yet it does not seem to have made any impression to speak of upon him at the time, to judge from his actions. It is also probable that the dredger would have leaked badly if she were working so as to open and shut the brick work around the boilers four inches, and yet the defendants contend that there was little or no leaking of an unusual character

up to midnight, which was the last time in regard to which there was testimony as to the condition of the dredger before she sank. Mr. Ward, the machinist and engineer who superintended the repairs of the dredger and put in the brick work, testified that it would be an impossibility for the brick work to open and shut in the manner described, because it was held by iron clamps or flanges, and that if such opening or shutting had occurred the clamps or
508 flanges, which were riveted to the boilers, would have broken.

There was ample evidence upon which to base a finding that the defendants were negligent in keeping the dredger where she was under the existing conditions, and, if there was such negligence, the jury was justified in finding that it was the proximate cause of the loss. In the first place the dredger was fully described to the jury and from that description, as well as from the testimony of Captain Macauley, an expert, to whom the dredger was described in a hypothetical question, and who was also personally thoroughly familiar with her, having formerly operated her, the jury could not very well have found otherwise than that she "was not a sea-going dredger." It was also shown by the testimony of several witnesses that rough water might have been expected from time to time at the place where the dredger was moored and indeed that wind and water as heavy as on the occasion in question were not infrequent at that place. One witness, Haggart, testified also that at noon or a little earlier on the day before the dredger sank she was taking seas, and that during that afternoon she was taking water in over the deck, though not very much, although when he left at six in the evening the water was not coming over. Another, Martin, testified that, although when he retired at midnight the dredger was dry, all the water that came in having been kept pumped out, yet when he was awakened at about 2:20 he found the water in the engine room up to his knees and the sea "coming over the stern of the boat, coming all over it, * * * All the swell that came in ahead of the deck of the be[at] came all over the boat. * * * Too much water came ove[r] * * * I saw the water come over the stern, when the sea is coming it came all on the deck." It is contended that because the dredger was kept practically dry up to midnight, and there is some testimony on the part of the defendants that the wind had moderated some, the water could not have come over the deck but must have come through the bottom owing to some unknown defect in the dredger,
509 but the fact that the dredger was kept dry up to that time would seem to show more strongly still that the water could not have come through the bottom, for there was ample depth for the dredger and no likelihood of striking below, and it is improbable, or the jury might have so found, that the dredger would begin leaking suddenly so as to let in such large quantities of water. The evidence showed also that the dredger had been thoroughly repaired and was in first class condition only eight months before. The jury may have thought it more probable that she took in a large quantity of water over the stern, as the witness testified, by reason of an unusually large wave or by reason of the sea becoming rougher. One witness testified that for several days the sea grew rougher, although

the wind remained about the same. The roughness of the sea, of course, did not depend entirely on the local wind. The waves, as we have seen, came square against the stern of the dredger after her position changed the day before. Lastly, so far as the evidence on this point need be referred to, there was the testimony of the experts, Captains Macauley and Lorenzen, who replied to hypothetical questions that it would not be safe or prudent for a dredger of this description to be moored in such a place under such conditions. The defendants and the trial judge seem to think that this expert testimony was the only evidence on this question, but, as we have seen, it was not. The plaintiff's requested instruction 12 allowed the jury to find negligence from the other evidence. The effect of the expert testimony is sought to be avoided mainly on two grounds. One of these is that the hypothetical question omitted the essential fact that there was a coping sixteen inches high around the house of the dredger to protect her from the seas washing over the decks. It is not apparent or probable that this would have made any difference in the answers of these experts. Captain Macauley also says that he saw the dredger just before she was taken to Pearl Harbor; he was also familiar with her and it does not appear that the coping
510 was put on after he became familiar with her. This witness also says that "the main fact of her being unsafe there was that she was not a sea-going dredger, and you are always in danger of being swamped by a heavy sea." It is true a special bulkhead had been erected on deck just before the dredger was taken to Pearl Harbor, but it was only across the front just behind the ladder, and of course could afford no protection when the dredger had her stern to the waves. Indeed, we may add in passing, that failure to put a bulkhead all around her when she might part some of her cables and swing around at any time or failure to erect a bulkhead across the stern when she did swing around or failure to haul her back to her original position with bow to the waves, might well be regarded as negligence independently of keeping her on the bar in rough weather. The fact that the defendants used two other dredgers in the same locality is of little importance. They were constructed differently and were apparently better protected from the waves. At most it was a question for the jury. The other contention in regard to the expert testimony is substantially that it *begged* the question. The hypothetical question, after setting forth the assumed facts, was as follows: "Assuming these facts to be true, with your experience would you say it was safe or prudent for a dredger such as I have described to be moored in such a place under such conditions?" Captain Macauley's answer was, "Decidedly not." The defendants contend, quoting from the opinion of the trial judge, that "the question might as well have been: * * * 'the dredger having parted her moorings in the storm and having sunk and been lost, was she safely and prudently moored?' or 'having sank was she safe?'" and that "only a fool or a knave could answer such a question in the negative" (affirmative), and consequently that the answer amounts to nothing. The question was admitted by the court and not objected to by defendants' counsel. The statement of the assumed facts may not be

above criticism but it was not objected to. It need not have referred to the loss of the dredger, but Captain Macauley said that it
511 would not have made a particle of difference in his answer if it had been found that the dredger had not been swamped by water coming over her side or stern. He knew also that she had sunk irrespective of the statement in the hypothetical question. The question, however, was not in substance, as contended, whether the dredger was safely and prudently moored or whether she was safe, but whether it was safe *or* prudent for her to be moored as described.

It was unnecessary to put it in the form in which the defendants and the circuit judge contend it should have been put, namely, whether the mooring of the dredger as described was such an act as an ordinarily careful and prudent man would exercise as to his own property under similar circumstances. The form used is a common form. See Transportation Line *v.* Hope, 95 U. S. 297; Union Insurance Co. *v.* Smith, 124 U. S. 405, 423. Nor can refuge be taken, as is attempted, in Captain Macauley's statements that "it was a prudent thing to moor her where she was moored in fine weather" and that "she was moored all right as I understand it." The question was not whether it was prudent to moor her there in fine weather but whether it was safe for her to be moored there under the described conditions, that is the conditions that existed when she sank. The captain makes himself clear in his statements taken as a whole when he says it would be a prudent thing to moor her where she was moored "in fine weather, but very imprudent to keep her there in bad weather;" and when he says in answer to the next question, "No matter what kind of moorings?" "The better the moorings the longer she stayed there, she was moored all right as I understand it;" and in answer to the next question, "The longer she would stay under or above the water?" "The seas coming over, it was a matter of time when she would fill and sink to the bottom; she would fill up and certainly go to the bottom;" and in answer to the next question, "It would not make any difference about the moorings?" "Not a bit; the moorings would hold her there;" and when he says,
512 "I cannot see any reason for keeping here there," and that it would be a proper course to pursue upon the springing up of southerly weather "to bring her into a safe harbor" and that "Pearl Harbor was a safe harbor near there." These statements alone, irrespective of the answers to the long hypothetical question, are sufficient in themselves; and the argument that according to these statements the only act, if any that was negligent was in keeping the dredger there in rough weather, and that that was not negligent because there was no available means of taking her to a place of safety in such weather has already been answered by showing that it was negligent to put the dredger in a palpably dangerous position without providing means for taking her out of that position when danger approached. As well might it be argued that because it would be prudent to moor her in calm weather with, say, two cables, it would not be negligent to leave her moored so in rough weather because there were not other cables available and no precautions had been

taken to have sufficient cables for such weather as might reasonably be expected.

It is contended also that the evidence does not justify a verdict for so large a sum as $25,000 (1) because there was no direct evidence as to the value of the dredger at the time she was lost, and (2) because portions of the property sued for to the value of $10,800 were returned. The evidence shows that the cost of the dredger when new, 16 or 17 years ago, was $65,000; that in 1901 her value was about $20,000; that repairs to the extent of $26,000 were then made, and that in the following year, 1902, immediately before the defendants took over the dredger, about $10,000 was expended in repairs and new machinery; that she was in first-class order and worth $45,000 when the defendants took her over eight months before she sank, during which period she had been used in the quiet harbor of Honolulu. There was no evidence of any special deterioration during that period, and she was apparently considered by the defendants as in sufficiently good order for extensive use in the
513 comparatively rough water of the Pearl Harbor bar. It is true that the bond for her return in good working order was for only $10,000, but that is of little significance. There was an obligation to return her irrespective of the bond, and additional security to the amount of $10,000 might well have been deemed sufficient to cover any damages from causes other than fire that might occur in the harbor of Honolulu. Of more significance is the provision in the contract that she was to be kept insured to the amount of $20,000 against loss or damage by fire, which would indicate that her value was regarded as of a greater amount. There is nothing to indicate that she deteriorated from a value of $45,000 to a value of less than $25,000 in the eight months of her use by the defendants in the harbor of Honolulu or that she was in a bad condition at all when she was lost. Evidence that the defendants obtained marine insurance to the amount of $20,000 on her when they took her to Pearl Harbor was excluded. The evidence was sufficient to justify a finding that her value was $25,000 at the time she sank, without any direct evidence, which would naturally be in the form of opinion evidence, as to her value at the time she was lost, and the trial judge so held on the motion for a new trial. And yet there was such direct evidence, and that from one of the defendants' own witnesses. Captain Parker, who had had much to do with dredgers, and was familiar with this one at the time she was lost, testified: "I could duplicate—rather build a machine with the same capacity, just as good a machine in my estimation, for $25,000." As to the portions of the property returned, they were not taken to Pearl Harbor at all,—with the exception of the pontoons, which were not a part of the dredger. The complaint alleges that the dredger and other property was hired to the defendants, that the dredger was reasonably worth $25,000, and that by reason of the failure of the defendants *to* return the dredger and machinery described in the contract the plaintiff was damaged in the sum of $25,000. The evidence already referred to applies in large measure to the dredger
514 alone and not to these other things. For instance, Captain Parker's testimony just quoted was given in reply to a ques-

tion in regard "to the dredger which was sunk in the condition it was in." No claim for damages was made by the plaintiff for the portions of the property that were returned.

The exceptions are overruled.

(Signed) W. F. FREAR.
(Signed) A. A. WILDER.
(Signed) J. T. DE BOLT.

E. C. Peters, Attorney General, for the plaintiff.

S. H. Derby (Kinney, McClanahan & Derby on the brief) for the defendants.

Endorsed: Supreme Court. Territory of Hawaii. Territory of Hawaii by C. S. Holloway, Superintendent of Public Works *vs.* C. E. Cotton, E. J. Cotton and James B. Agassiz, partners under the name of Cotton Bros. & Co. Opinion. Filed September 27, 1906 at 10 A. M. J. A. Thompson, Clerk.

515 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

Clerk's Minutes.

Vol. 2, P. 15.

MONDAY, *May* 28, 1906.

TERRITORY OF HAWAII
vs.
COTTON BROS.

Court met at 10 o'clock A. M.
Present on the Bench, Hon. W. F. Frear, Chief Justice.

(Exceptions from Circuit Court, First Circuit.)

Motion to Dismiss Defendants' Amended Bill of Exceptions.

Mr. Peters who is present in Court on behalf of the plaintiff asks that the hearing of the motion be set for some afternoon when Mr. S. H. Derby can be present after session of the District Court or at 11 o'clock next Saturday morning.

The Court sets the hearing of the motion for next Thursday afternoon subject to any engagements Mr. Peters might have before the Circuit Court.

There being no further business before the Court, at 10:20 A. M., it adjourns until 10 o'clock next T-ursday morning (May 31).

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

Vol. 2, P. 16.

THURSDAY, *May* 31, 1906.

TERRITORY OF HAWAII
vs.
COTTON BROS.

Court met at 10 o'clock A. M.
Present on the Bench: Hon. W. F. Frear, C. J.

(Exceptions from Circuit Court, First Circuit.)

Motion to Dismiss Amended Bill of Exceptions.

The Court of its own motion orders hearing of said motion
516 continued until next Monday morning (June 4) when time will be set.

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

Vol. 2, P. 18.

MONDAY, *June* 4, 1906.

TERRITORY OF HAWAII
vs.
COTTON BROS.

Exceptions from Circuit Court, First Circuit.

Court met at 10 o'clock A. M.
Present on the Bench: Hon. W. F. Frear, C. J., Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

Motion to Dismiss Amended Bill of Exceptions.

The Court orders the hearing on the motion continued until 2 o'clock Thursday afternoon (June 7).

Vol. 2, P. 23.

SATURDAY, *June* 9, 1906.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Territory of Hawaii,
v.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Co.

Exceptions from Circuit Court, First Circuit.

Court met at 10 o'clock A. M.
Present on the Bench: Hon. W. F. Frear, C. J., Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

Hearing on Plaintiff's Motion to Dismiss.

Defendants' Amended Bill of Exceptions.

Filed request for substitute justice in the above case.

517 Hon. J. T. De Bolt, First Judge First Circuit Court sitting in place of Hon. Alfred S. Hartwell, Associate Justice, disqualified.

Present: E. C. Peters, Attorney General for the plaintiff-movant, S. H. Derby of the firm of Kinney, McClanahan & Derby for defendants.

At 11:12 A. M. Mr. Peters opens to the Court and argues in support of the motion.

At 11:42 A. M. Mr. Derby argues.

Mr. Peters replies.

At the conclusion of the argument of respective counsel, the Court orders counsel to file their briefs on the motion on next Thursday morning and allows plaintiff five days after the rendition of the decision on the motion within which to file his brief on the main case.

Submitted and taken under consideration.

At 12:5 P. M. the Court adjourns until 10 o'clock next Tuesday morning, June 12.

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

Vol. 2, P. 43.

TUESDAY, *July* 10, 1906.

Court met at 10 o'clock A. M.

Present on the Bench: Hon. A. A. Wilder, J.

The Court renders a decision on plaintiff's motion to dismiss defendants' Bill of Exceptions in the following case, viz.:

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Territory of Hawaii,
v.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Partners, under the Firm Name of Cotton Brothers & Co.

Exceptions from Circuit Court, First Circuit.

518 Motion to dismiss Bill of Exceptions denied.

There being no business before the Court this day it adjourns until 10 o'clock next Monday morning July 16.

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

Vol. 2, P. 44.

MONDAY, *July* 16, 1906.

Court met at 10 o'clock A. M.

Present on the Bench: Hon. W. F. Frear, Chief Justice, Hon. A. A. Wilder and J. T. De Bolt, First Judge First Circuit Court.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,

v.

COTTON BROS. & CO.

Exceptions from Circuit Court, First Circuit.

Hearing.

Present on the Bench: Hon. W. F. Frear, C. J., Hon. A. A. Wilder and Hon. J. T. De Bolt, First Judge First Circuit Court in place of Hon. Alfred S. Hartwell, disqualified.

Attorneys present: E. C. Peters, Attorney General for the plaintiff-appellee, S. H. Derby of the firm of Kinney, McClanahan & Derby for the defendants-appellants.

Mr. Derby opens to the Court and asks that the case be not decided until he had filed his reply brief the time for filing such reply brief to expire on Thursday next.

Mr. Peters states that he is ready to submit the case on
519 the briefs already filed and on the oral argument.

Mr. Derby insisted for time to file his reply brief.

The Court rules that Mr. Derby is allowed and entitled to the time under the rules.

At 10:25 A. M. Mr. Derby commences with his argument concluding at 11:30 A. M.

At 11:30 A. M. Mr. Peters commences with his argument.

At 12 Noon the Court takes a recess until 2 P. M. to-day.

Afternoon Session.

Court again met at 2 P. M. this day.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,

v.

COTTON BROS. & CO.

From Above.

Hearing resumed.

Same counsel present.

At 2:2 P. M. Mr. Peters resumes with his argument concluding at 2:37 P. M.

Mr. Derby rises and again states that the time for filing his reply

brief expires on Thursday and he would like very m[illegible]n that time be extended until Saturday and that he will not object to counsel for plaintiff filing his reply brief within a week thereafter.

Mr. Peters offers no objection.

The Court allows Mr. Derby until Saturday to file his reply brief.

At 2:48 P. M. the Court adjourns until 10 o'clock tomorrow morning (July 17).

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

520 Vol. 2, P. 51.

THURSDAY, *Sep.* 27, 1906.

Court met at 10 o'clock A. M.

Present on the Bench: Hon. W. F. Frear, C. J.

The Court renders its opinion in the following case, to wit:

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,
v.
C. E. COTTON, E. J. COTTON, and JAMES B. AGASSIZ, Partners, under the Name of Cotton Brothers and Company.

Exceptions from Circuit Court, First Circuit.

The Exceptions are overruled.

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

521 Papers on Writ of Error to United States Supreme Court.

521½ In the Supreme Court of the Territory of Hawaii.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,
vs.
E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Before the Honorable W. F. Frear, Chief Justice of said Supreme Court.

Petition for Writ of Error and Supersedeas from the Supreme Court of the United States.

To the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii:

Your petitioners, E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers

& Company, defendants in the above cause, respectfully represent and show:

That on the 27th day of Septemb[illegible] A. D. 1906, the Supreme Court of the Territory of Hawaii rendered a final judgment in the above cause in favor of the plaintiff and against these defendants, which said judgment involved more than the amount of Five Thousand Dollars ($5,000) exclusive of costs, to wit: the sum of over Twenty Five Thousand Dollars ($25,000), in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

522 Wherefore and because your petitioners are aggrieved by said judgment they pray that a writ of error may issue in their behalf out of the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent up to the said Supreme Court of the United States, and also that an order be made fixing the amount of security which your petitioners shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in the above cause be suspended and stayed until the determination of the writ of error by the Supreme Court of the United States.

Dated Honolulu, October 4th, A. D. 1906.

(Signed) KINNEY, McCLANAHAN & DERBY,
Attorneys for the Defendants.

Endorsed: No. —. Supreme Court, Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. & Co. Petition for Writ of Error, &c. Filed Oct. 4, 1906, at 2:10 P. M. Henry Smith, Clerk Supreme Court. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu. Attorneys for —— (Office No. —).

523 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Plaintiff,

vs.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Defendants.

Before the Honorable W. F. Frear, Chief Justice of said Supreme Court.

Order Allowing Writ of Error and Supersedeas from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii.

The above entitled matter coming before me upon the petition of the defendants therein for a writ of error from the Supreme Court

of the United States to the Supreme Court of the Territory of Hawaii, and upon examination of said petition and the record in said matter, and desiring to give the defendants an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is hereby ordered that a writ of error be and the same hereby is allowed from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii in the above cause, and that the supersedeas bond for costs and damages in the penal sum of $32,000 herewith presented by said defendants be and the same is hereby approved, and that all further proceedings in the
524 above cause be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated Honolulu, this 4th day of October, A. D. 1906.

(Signed) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: No. —. Supreme Court, Territory of Hawaii. Territory of Hawaii *vs.* Cotton Bros. & Co. Order Allowing Writ of Error, &c. Filed Oct. 4, 1906, at 2:10 P. M. Henry Smith, Clerk Supreme Court. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for —— (Office No. —).

525 In the Supreme Court of the United States, October Term, 1906.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents:

That we E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, as Principals, and The United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, as Surety, are held and firmly bound unto the Territory of Hawaii in the sum of Thirty Two Thousand Dollars ($32,000) to the payment of which well and truly to be made we bind ourselves, our successors, heirs, executors and administrators jointly and severally by these presents.

The condition of this obligation is such that.

Whereas in a suit pending in the Supreme Court of the Territory of Hawaii between the Territory of Hawaii by C. S. Holloway, Super-

intendent of Public Works of said Territory, as plaintiff,
526 and E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, as defendants, judgment was rendered against said defendants, and said defendants having obtained a writ of error and filed a copy thereof in the office of the clerk of said Supreme Court of the Territory of Hawaii to reverse the judgment in said suit, together with a citation directed to the said Territory of Hawaii citing and admonishing it to be and appear before the Supreme Court of the United States held at the City of Washington in the District of Columbia;

Now therefore if the said E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, shall prosecute their said writ of error to effect and pay all costs and damages if they shall fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and effect.

In witness whereof the said E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, have caused this bond to be executed in their behalf by said James B. Agassiz, one of said co-partners, and The United States Fidelity & Guaranty Company has caused its corporate name to be signed and its corporate seal to be affixed by its duly authorized agent this 4th day of October, A. D. 1906.

E. J. COTTON, C. E. COTTON, AND
JAMES B. AGASSIZ,
Co-partners, Doing Business under the Firm Name
of Cotton Brothers & Company,
(Signed) By JAMES B. AGASSIZ, *Principals.*
[SEAL.] THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,
(Signed) By A. N. CAMPBELL,
(Signed) WILLIAM O. SMITH,
Attorneys in Fact, Surety.

Approved:
(Signed) W. F. FREAR,
527 *Chief Justice of the Supreme Court of the*
Territory of Hawaii.

Oct. 4, 1906.

Endorsed: No. —. United States Supreme Court. Cotton Bros. & Co. *vs.* Territory of Hawaii. Bond on Writ of Error. Filed Oct. 4, 1906, at 2:10 P. M. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for —— (Office No. —).

528 In the Supreme Court of the United States, October Term, 1906.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Assignment of Errors.

Now come E. J. Cotton, C. E. Cotton and James B. Agassiz co-partners doing business under the firm name of Cotton Brothers & Company, plaintiffs in error herein and respectfully submit:

That in the record, proceedings, decision and final judgment of the Supreme Court of the Territory of Hawaii in the cause entitled Territory of Hawaii by C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii plaintiff, *vs.* E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company in which final judgment of said Supreme Court of the Territory of Hawaii was rendered on the 27th day of September A. D. 1906, the said E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company having obtained a writ
529 of error upon said judgment of said Supreme Court of the Territory of Hawaii to the Supreme Court of the United States at Washington in the District of Columbia, assign for error in the record and judgment aforesaid and in the proceedings had in said cause before said judgment the following:

1.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on the amended bill of exceptions of the present plaintiffs in error (duly filed in the Circuit Court of the First Circuit on April 30th, 1906) taken and allowed to certain rulings in the above cause and to the verdict therein, that none of the exceptions contained therein except that to the verdict could be considered.

2.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the exceptions therein contained to instructions given and refused by the Circuit Court of the First Circuit and to the striking out of certain testimony were improperly incorporated in said amended bill of exceptions.

3.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as

aforesaid that the exceptions contained in said bill of exceptions should be overruled.

4.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the exception to the verdict of the jury rendered on May 27th, 1904 in the Circuit Court of the First Circuit
530 should be overruled.

5.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that said verdict was not contrary to the evidence.

6.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the present defendant in error was not estopped to claim that the taking of the Government dredge to Pearl Harbor was negligence.

7.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the present defendant in error did not consent through its proper officers to the taking of said dredge to said Pearl Harbor.

8.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the contract between the plaintiffs in error and the defendant in error did not necessarily permit the use of said dredge at said Pearl Harbor.

9.

That said Supreme Court of the Territory of Hawaii erred
531 in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the taking of said dredge to said Pearl Harbor under the circumstances of the case was negligent on the part of said plaintiffs in error.

10.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the placing of said dredge where it was placed in said Pearl Harbor was negligent on the part of said plaintiffs in error.

11.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that said plaintiffs in error kept said dredge in said Pearl Harbor without proper protection.

12.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the consent, if any, given by the defendant in error to the taking of the said dredge to Pearl Harbor was conditional.

13.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that there was negligence on the part of said plaintiffs in error in keeping said dredge where she was moored under the conditions that prevailed when said dredge was lost.

532

14.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the negligence of the plaintiffs in error was the proximate cause of the loss of said dredge.

15.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the hypothetical question put by the defendant in error to its expert witnesses was one on which a finding that the plaintiffs in error were negligent could be based.

16.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that the value of the dredge at the time she was lost was $25,000.

17.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said amended bill of exceptions taken as aforesaid that the evidence justified the finding that no deduction could be made for the materials returned by the plaintiffs in error to the defendant in error.

18.

That said Supreme Court of the Territory of Hawaii erred in deciding on March 8, 1906, on the motion of the present plaintiffs

in error to quash the writ of error taken by the present defendant in error from an order granting a new trial made by the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court
533 of the First Circuit of the Territory of Hawaii dated July 18th, 1905, that said order was beyond the power and jurisdiction of said judge to make.

19.

That said Supreme Court of the Territory of Hawaii erred in deciding on said motion on said date that said order could be reviewed on a writ of error.

20.

That said Supreme Court of the Territory of Hawaii erred in deciding on said motion as aforesaid that said order was not interlocutory and hence was reviewable on a writ of error.

21.

That said Supreme Court of the Territory of Hawaii erred in deciding on said motion as aforesaid that the bond provided for under Section 1805 of the Revised Laws of the Territory of Hawaii must be filed within — (10) days after verdict whether judgment was then rendered or not.

22.

That said Supreme Court erred in deciding on said motion to quash as aforesaid that the bond provided for under Section 1805 of the Revised Laws of the Territory of Hawaii must be filed ten (10) days after verdict whether judgment was entered or not.

23.

That said Supreme Court of the Territory of Hawaii erred in deciding on said motion as aforesaid that the requirement of such a bond was not waived by the present defendant in error.

24.

That said Supreme Court of the Territory of Hawaii erred in denying said motion to quash said writ of error.

534 25.

That said Supreme Court of the Territory of Hawaii erred in deciding on the 9th day of April A. D. 1906, when the aforesaid writ of error came up for hearing on its merits that a decision of the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit filed on March 4, A .D. 1905 in the above cause was one which said judge was without power or jurisdiction to make.

26.

That said Supreme Court of the Territory of Hawaii erred in deciding on said writ of error as aforesaid that the attack made on said decision of said Judge Gear by said writ of error was not a collateral attack.

27.

That said Supreme Court of the Territory of Hawaii erred in deciding on said writ of error as aforesaid that Judge Gear did not grant the motion of the present plaintiffs in error for a new trial upon his own motion.

28.

That said Supreme Court of the Territory of Hawaii erred in deciding on said writ of error as aforesaid that the aforesaid order of the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Circuit was an order granting the motion of the present plaintiffs in error for a new trial and not an order for a new trial made on his own motion.

29.

That said Supreme Court of the Territory of Hawaii erred in deciding on said writ of error as aforesaid that said Judge Lindsay was without power or jurisdiction to make said order of new trial.

535

30.

That said Supreme Court of the Territory of Hawaii erred in deciding on said writ of error as aforesaid that the aforesaid decision of the aforesaid Judge Gear could be attacked on a writ of error from the aforesaid order of the aforesaid Judge Lindsay.

31.

That said Supreme Court of the Territory of Hawaii erred in allowing said writ of error and reversing the aforesaid order of the aforesaid Judge Lindsay dated July 18th A. D. 1905.

32.

That said Supreme Court of the Territory of Hawaii erred in rendering and entering a formal judgment on the 14th day of April, 1906, that the aforesaid order of new trial of July 18th 1905 should be reversed.

33.

That said Supreme Court of the Territory of Hawaii erred in rendering and entering final judgment against the plaintiffs in error on the 27th day of September A. D. 1906.

Wherefore and on account of said manifest errors and each of them, all of which errors appear on the record of said cause and in the decision and judgment of said Supreme Court of said Territory of Hawaii, said E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company pray that the judgment of said Supreme Court of the Territory of Hawaii in said cause may be reversed and that the said Supreme Court of the Territory of Hawaii be ordered to enter an

order granting a new trial to said plaintiffs in error and re-
535 manding the cause to the Circuit Court *Court* of the First Circuit for such new trial.

Dated October 4th, A. D. 1906.

(Signed) KINNEY, McCLANAHAN & DERBY,
Attorneys for Plaintiffs in Error.

Endorsed: No. —. United States Supreme Court. Cotton Bros. & Co. *vs.* Territory of Hawaii. Assignment of Errors. Filed Oct. 4, 1906, at 2:10 P. M. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for ——. (Office No. —.)

537 In the Supreme Court of the United States, October Term, 1906.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you or some of you, being the highest court of law or equity in said Territory in which a decision could be had in said suit between the Territory of Hawaii by C. S. Holloway, Superintendent of Public Works, plaintiff, and E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, defendants, wherein was in question a matter where the amount involved, exclusive of costs, exceeded the sum of Five Thousand Dollars ($5,000)
538 a manifest error hath happened to the great damage of the said E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, as by their complaint appears we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-erning the same, to the Supreme Court of the United States, together with this writ, so that you have the same

at Washington within sixty (60) days from the date hereof, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court of the United States the fourth day of October in the year of our Lord One Thousand Nine Hundred and six.

[SEAL.] (Signed) HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by:
(Signed) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Oct. 4, 1906.

Service of a copy of the foregoing is hereby admitted this 4th day of October A. D. 1906.
(Signed)
E. C. PETERS,
Attorney General, H. T'y.

Endorsed: No. —. United States Supreme Court. Cotton Bros. &c. *vs.* Territory of Hawaii. Writ of Error &c. Filed Oct. 4, 1906, at 2:10 P. M. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for ——. (Office No. —.)

539 In the Supreme Court of the United States, October Term, 1906.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Citation to Defendant in Error.

The United States of America to the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington in the District of Columbia, within sixty (60) days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii wherein E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, are plaintiffs in error, and you are
540 defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in

said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii the fourth day of October A. D. 1906.

[SEAL.] (Signed) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the foregoing is hereby admitted this 4th day of October A. D. 1906.

(Signed) E. C. PETERS,
Attorney General, H. T'y.

Endorsed: No. —. United States Supreme Court. Cotton Bros. & Co. *vs.* Territory of Hawaii. Citation to Defendant in Error. Filed Oct. 4, 1906, at 2:10 P. M. Henry Smith, Clerk Supreme Court Ter. of Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for ——. (Office No. —.)

541 In the Supreme Court of the Territory of Hawaii.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name and Style of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works, Defendant in Error.

Certificate of Clerk to Transcript of Record.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the command of the Writ of Error herein do hereby transmit to the Supreme Court of the United States the above and foregoing transcript of record and do certify the same to be a full, true and correct transcript of the record and proceedings had in the said Supreme Court of the Territory of Hawaii in the case entitled in said Court, "The Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works, Plaintiff *vs.* E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name and style of Cotton Brothers Company, defendants," as required by the Praecipe of the attorneys for the plaintiffs in error attached hereto.

542 I do further certify that the original citation and the original writ of error together with the admission of service therein are hereto attached and herewith returned and that true and correct copies of the petition for the writ of error, order allowing the writ of error, bond on writ of error, assignment of errors, writ of error and citation to defendant in error, as the same are on

file in my office are included in the transcript of record sent up herewith.

I do further certify that said original writ of error and copy of the same for the defendant in error and also the original of said bond were lodged in my office on the 4th day of October A. D. 1906.

In testimony whereof I have hereunto set my hand and caused the seal of the said Supreme Court of the Territory of Hawaii to be hereunto affixed, at City of Honolulu, in said Territory, this 30th day of October A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court
of the Territory of Hawaii.

543 In the Supreme Court of the Territory of Hawaii.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name and Style of Cotton Brothers & Company, Plaintiffs in Error,

vs.

TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Praecipe Designating Parts of Record to be Included in Transcript.

To Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii, in the case entitled, "Territory of Hawaii, by C. S. Holloway, Superintendent of Public Works, Plaintiff *vs.* E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name and style of Cotton Brothers & Company, defendants," to be filed in the Supreme Court of the United States, pursuant to a Writ of Error allowed in said cause, and to include in such transcript of record, the following and no other papers and exhibits, to-wit:—

(*a*) The following papers in the record as it came before the Supreme Court of the Territory of Hawaii on the Writ of Error brought by the present defendant in error;

1. Bill of complaint,

2. Agreement between Superintendent of Public Works and Cotton Bros. & Co.

3. Answer of defendants,

544 4. Stipulation that complaint be amended,

5. Defendants' request for instructions,

6. Defendants' request to modify instructions proposed to be given at request of plaintiff,

7. Verdict,

8. Defendants' motion for a new trial and notice of motion,
9. Defendants' motion to extend time for filing bond and notice of motion,
10. Judgment,
11. Defendants' further notice of motion for a new trial and notice of motion,
12. Judgment May 27, 1904 and notice
13. Bond on motion for a new trial,
14. Defendants' bill of exceptions and notice
15. Defendants' motion for extension of time for filing further bill of exceptions,
16. Order extending time for filing bill of exceptions,
17. Stipulation that argument and decision on motion for a new trial be had in vacation as of term time,
18. Stipulation as to time of filing bill of exceptions
19. Cablegram,
20. Endorsements of envelope which contained cablegram,
21. Letter dated San Francisco, February 25, 1905, by George D. Gear to W. R. Sims,
22. Decision of Judge Gear on motion for new trial,
23. Motion for formal order granting defendants a new trial and notice of motion,
24. Order granting defendants' motion for a new trial,
25. Exceptions to order granting a new trial,
26. Plaintiff's proposed bill of exceptions,
27. Defendants' exceptions and objections to plaintiff's proposed bill of exceptions,
28. Defendants' objections to plaintiff's proposed bill of exceptions
29. Motion that bill of exceptions be settled and signed and notice of motion,
30. Clerk's Minutes, Circuit Court,
31. Clerk's certificate of record,
32. Petition for Writ of Error,
33. Assignment of errors,
34. Bond on Writ of Error,
35. Summons and return of service of same,
36. Writ of Error,
37. Notice that writ of error has issued
38. Request for a substitute justice
39. Motion to quash writ of error and notice of motion,
40. Opinion of Supreme Court on motion to quash writ of error
41. Petition for rehearing,
42. Decision of Supreme Court on petition for rehearing,
43. Opinion of Supreme Court on Writ of Error,
44. Decision and judgment.
45. Notice of decision on writ of error.

(*b*) The following papers in the record as it came before the Supreme Court of the Territory of Hawaii on an amended bill of exceptions of the present plaintiff in error, same being separate time in which said cause came before the Supreme Court.

46. Motion to amend bill of exceptions, notice of motion and affidavit of S. H. Derby,
47. Affidavit of George D. Gear,
545 48. Order extending time to file bill of exceptions,
49. Exceptions,
50. Motion to dismiss defendants' pretended bill of exceptions filed June 8, 1904 and affidavit of E. C. Peters
51. Notice to further amend bill of exceptions,
52. Affidavit of Fred W. Milverton,
53. Affidavit of Alfred S. Hartwell,
54. Defendant's amended bill of exceptions (Amending original bill of June 8, 1904),
55. Notice of filing amended bill of exceptions,
56. Plaintiff's exceptions and objections to the defendants' amended bill of exceptions (Amending original bill of exceptions of June 8, 1904),
57. Stipulation and order *re* use of record on writ of error,
58. Clerk's Minutes Circuit Court,
59. Transcript of evidence on settlement of bill of exceptions,
60. Motion to dismiss defendants' amended bill of exceptions and notice of motion.
61. Request for a substitute justice,
62. Decision on motion to dismiss defendants' bill of exceptions,
63. Plaintiff's Exhibit "A," agreement between Department of Public Works and Cotton Brothers & Co. dated January 10, 1902,
64. Plaintiff's Exhibit "C," I-ventory of Government suction dredge
65. Defendants' Exhibit "2," letter dated April 25, 1903, by Marston Campbell, Asst. Supt. Public Works to Cotton Bros. & Co.,
66. Defendants' Exhibit "3," letter dated April 29, 1903, by Marston Campbell to Cotton Bros. & Co.
67. Defendants' Exhibit "4," letter dated May 4, 1902, by J. H. Boyd, Superintendent of Public Works to Cotton Bros. & Co.,
68. Defendants' Exhibit "6," document entitled "Dredge stuff returned,"
69. Transcript of testimony in main case,
70. Proposed instructions for plaintiff,
71. Opinion and judgment of the Supreme Court,
72. Clerk's Minutes Supreme Court.

(*c*) Papers filed on Writ of Error to Supreme Court of United States:—

73. Petition for writ of error and supersedeas from the Supreme Court of the United States,
74. Order allowing the writ of error and supersedeas from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii,
75. Bond on writ of error,
76. Assignment of errors,
77. Writ of error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii,
78. Citation to defendant in error.

Said transcript to be prepared as required by law and the rules of this court and the Supreme Court of the United States.

Dated Honolulu, Oahu, Oct. 24, 1906.

KINNEY, McCLANAHAN & DERBY,
Attorneys for E. J. Cotton, C. E. Cotton, and James B. Agassiz, Co-partners, Doing Business under the Firm Name and Style of Cotton Bros. & Co.

546 In the Supreme Court of the United States, October Term, 1906.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Citation to Defendant in Error.

The United States of America to the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington in the District of Columbia, within sixty (60) days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein E. J. Cotton, C. E. Cotton
547 and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii the fourth day of October A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the foregoing is hereby admitted this 4th day of October A. D. 1906.

E. C. PETERS,
Attorney General, H. T'y.

548 [Endorsed:] No. —. United States Supreme Court. Cotton Bros. & Co. *vs.* Territory of Hawaii. Citation to Def't in Error. Filed Oct. 4, 1906, at 2.10 P. M. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg. Honolulu, Attorneys for ——. (Office No. —.)

549 In the Supreme Court of the United States, October Term, 1906.

E. J. COTTON, C. E. COTTON, and JAMES B. AGASSIZ, Co-partners, Doing Business under the Firm Name of Cotton Brothers & Company, Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you or some of you, being the highest court of law or equity in said Territory in which a decision could be had in said suit between the Territory of Hawaii by C. S. Hollo-
550 way, Superintendent of Public Works, plaintiff, and E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, defendants, wherein was in question a matter where the amount involved, exclusive of costs, exceeded the sum of Five Thousand Dollars ($5,000), a manifest error hath happened to the great damage of the said E. J. Cotton, C. E. Cotton and James B. Agassiz, co-partners doing business under the firm name of Cotton Brothers & Company, as by their complaint appears we being willing that errror, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from the date hereof, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court of the United States the fourth day of October in the year of our Lord One Thousand Nine Hundred and Six.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by:
W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Oct. 4, 1906.

Service of a copy of the foregoing is hereby admitted this 4th day of October A. D. 1906.

E. C. PETERS,
Attorney General, H. T'y.

551 [Endorsed:] No. —. United States Supreme Court. Cotton Bros. & Co. *vs.* Territory of Hawaii. Writ of Error &c. Filed Oct. 4, 1906, at 2.10 P. M. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for ——. (Office No. —.)

552 In the Supreme Court of the United States.

No. 500.

E. J. COTTON ET AL., Plaintiff in Error,
vs.
THE TERRITORY OF HAWAII.

Now come the plaintiffs in error in the above entitled cause by William B. Matthews their attorney, and assign for errors in the proceedings and judgment in the said cause, and say that there are therein, the following errors:

I. That the Supreme Court of the Territory of Hawaii erred in reversing and setting aside the order of the Circuit Court granting a new trial in the said cause.

II. That the said Supreme Court erred in affirming the judgment of the said Circuit Court.

III. That the said Supreme Court erred in not reversing the judgment of the said Circuit Court.

IV. That the said Supreme Court erred in overruling the exceptions of the defendants taken at the trial of the said cause.

V. That the said Supreme Court erred in overruling the motion of the defendants herein to quash the bill of exceptions taken by the plaintiff.

VI. That the said Supreme Court erred in making and entering the order made and entered by the said Court on April 14, 1906, reversing the order of the Court below granting a new trial of the said cause.

And the said plaintiffs in error, by authority of, and in accordance with the 9th section of the 10th

[Mutilated.]

553 for the consideration of the said errors, and as necessary to be printed, all of the transcript of the record of this cause filed in this Court, except the following portion of the said transcript, which portion the said plaintiffs in error desire and designated to be omitted in the printing of the said transcript, namely:

Pages 237 to 484, inclusive of both pages, being the testimony taken at the trial of the cause in the Circuit Court.

WILLIAM B. MATTHEWS,
Attorney for Plaintiff in Error.

Letter } No. 123,367. P. O., Washington, D. C.
Parcel }

Received for registration 2/14, 1907, from Wm. B. Matthews—1420 N. Y. Av. addressed to Attorney Gen. of Hawaii, Honolulu, Hawaii, 1 class postage prepaid.

POSTMASTER,
Per MARSHALL.

[On margin of receipt:] U. S. Registered Mails go to every post office in the world.

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[Across face:] Station C.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

This day personally appeared before me Walter H. Acker a Notary Public in and for said City and District, William B. Matthews, and made oath that he mailed by registered letter addressed to the Attorney General of Hawaii a copy of the foregoing assign

[Mutilated.]

554 [Endorsed:] File No. 20,465. Supreme Court U. S., October Term, 1906. Term No. 500. E. J. Cotton *et al.*, P. E. *vs.* The Territory of Hawaii, &c. Assignment of errors and designation by plaintiffs in error of parts of record necessary to be printed. Filed February 14", 1907.

Endorsed on cover: File No. 20,465. Hawaii Territory supreme court. Term No. 159. E. J. Cotton, C. E. Cotton, and James B. Agassiz, copartners, doing business under the firm name of Cotton Brothers & Company, plaintiffs in error, *vs.* The Territory of Hawaii, by C. S. Holloway, superintendent of public works. Filed November 21st, 1906. File No. 20,465.

Office Supreme Court, U. S.
FILED.
APR 27 1908
JAMES H. McKENNEY,
CLERK.

13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

No. ~~[illegible]~~ 7

E. J. COTTON ET AL., PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII, BY C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. ~~234~~ 22

HONOLULU RAPID TRANSIT & LAND CO., PLAINTIFFS IN ERROR,

vs.

JAMES L. HOLT, ASSESSOR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

MOTION TO ADVANCE AND SET CAUSES FOR HEARING.

Also Cases Nos. 235, 241, and 244.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

No. 159.

E. J. COTTON ET AL., PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII, BY C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 234.

HONOLULU RAPID TRANSIT & LAND CO., PLAINTIFFS IN ERROR,

vs.

JAMES L. HOLT, ASSESSOR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 235.

HONOLULU RAPID TRANSIT & LAND CO., APPELLANT,

vs.

JAMES L. HOLT, ASSESSOR, APPELLEE.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 241.

MORITA KEIZO, PLAINTIFF IN ERROR,

vs.

WILLIAM HENRY, HIGH SHERIFF OF THE TERRITORY OF ———, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 244.

JAMES L. HOLT, TAX ASSESSOR, ETC., PLAINTIFF IN ERROR,

vs.

INTER-ISLAND STEAM NAVIGATION CO., LTD., DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Motion to Advance and Set Causes for Hearing.

Comes now M. F. Prosser, Esq., attorney for the defendants in error in causes numbered 159, 234, 241, and 244, and attorney for the appellee in cause No. 235, and moves this honorable court that the causes hereinabove named be set for hearing on a day certain, prior to the adjournment of this court on Friday next.

The foregoing motion is based upon the statement of M. F. Prosser, counsel for the defendants in error in the

above-entitled causes, and counsel for the appellee in No. 235, hereto annexed and made a part hereof.

Dated WASHINGTON, *April* 25, A. D. 1908.

(Signed) M. F. PROSSER.

Attorneys for Defendants in Error in Nos. 159, 234, 241, *and* 244, *and Attorney for Appellee in* No. 235.

Statement.

The above-entitled causes, numbered, respectively, 159, 234, 235, 241, and 244 are all of great importance to the public interests of the Territory of Hawaii. In response to telegrams received from the clerk of this court and from the Solicitor General of the United States, counsel from Hawaii has been present at the call of the calendar of this court since the 21st day of March, last, expecting that said causes would be reached for argument; that owing to the distance that counsel has to travel, and owing to the expense attendant upon the appearance here of counsel, it would be a great hardship to the Territory of Hawaii should the above entitled causes not be heard at this term of this court; that the appropriation made by the Legislature of Hawaii to defray the expense of the argument of territorial causes before the Supreme Court of the United States, and other appellate courts outside of the Territory, amounts only to the sum of $3,000, covering a period of two years, which will not expire until the first day of July, 1909.

M. F. PROSSER,

Counsel for said Defendants in Error and Appell

Notice of Motion.

SIRS: You will please take notice that the foregoing motion will be presented to the Supreme Court of the United States for argument on Monday, the 27th day of April, A. D. 1908, at the hour of 12:00 M., of said day, or as soon thereafter as counsel can be heard.

Dated WASHINGTON, *April* 25, A. D. 1908.

(Signed) M. F. PROSSER,
Attorney for Defendants in Error in Causes on the Calendar Numbered 159, 234, 241, *and* 244, *and Attorney for the Appellee in No.* 235.

APR 20 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 17

ERNEST J. COTTON ET AL., PLAINTIFFS IN ERROR

vs.

THE TERRITORY OF HAWAII

Brief for Plaintiffs in Error

WILLIAM B. MATTHEWS,
CHARLES A. KEIGWIN,
Attorneys for Plaintiffs in Error

13735 GEO. B. HOWARD, PR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 159

ERNEST J. COTTON ET AL., PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII

Brief for Plaintiffs in Error

STATEMENT

This case comes to this court upon a writ of error to the Supreme Court of the Territory of Hawaii.

The action was brought in the Circuit Court of the First Circuit of the Territory, in May, 1903, by the Territory of Hawaii against the now plaintiffs

in error, who are partners under the firm name of Cotton Brothers and Company. The cause of action alleged was negligence on the part of the defendants in using and caring for a dredge boat belonging to the territory, and hired to the defendants, whereby the boat was sunk and became a total loss. (p. 1.)

The defendants pleaded a general denial, upon which issue was joined, and a trial by jury resulted in a verdict for the plaintiff in the sum of $25,000.

The verdict was rendered on May 27, 1904, and filed on the same day. (p. 11.)

On May 31, within the period allowed for the purpose, the defendants filed a motion for a new trial, stating as grounds therefor that the verdict was contrary to the evidence; that the verdict was contrary to law; that there was no evidence tending to show negligence on the part of the defendants; that the jury had failed to make proper allowance for a portion of the hired property returned to the plaintiff and worth $10,800; and errors committed by the court in matters of evidence and instruction, to which exceptions had been taken in due season. (p. 11.)

This motion was noticed for hearing on the following Friday, the 3d of June, or as soon thereafter as counsel could be heard.

No judgment had been entered upon the verdict when this motion was made, nor was there any judgment until four days after the date set for the hearing of the motion. The defendants, therefore, filed no bond for the stay of execution, a matter provided for by section 1805 of the Revised Laws of Hawaii, set out *infra*, it being their understanding of the section that it became applicable only after the entry of judgment.

On June 3, at the hour set for hearing of the motion, plaintiff's counsel requested an adjournment on account of his personal engagements, and at his instance the motion went over to June 7. On that day, upon the coming on of the motion, plaintiff's counsel, for the first time, raised the point that a motion for new trial could not be entertained unless a bond was filed under section 1805 R. L., and moved that the motion be dismissed for failure to file such bond. (pp. 13.)

Thereupon the defendants moved for leave to file the bond supposed to be required by the statute. The court, being of opinion that such bond could not be given before judgment (p. 43), directed judgment to be entered on the verdict, which was done on the same day, June 7. (pp. 13, 43.) On that day the defendants offered, and the court approved, a bond conforming to section 1805. (pp. 15, 61.)

At the same time the defendants renewed their motion for new trial and set the same for hearing on June 14 (p. 14), to which day the hearing was adjourned by order of the court. (p. 43). A further adjournment having been taken, the motion was heard and taken under advisement by the court on June 17. (p. 44.) At this hearing, the plaintiff renewed its motion to deny a hearing of defendant's motion on the ground that the supposedly requisite bond had not been filed, and this motion was overruled. (p. 44.)

On June 24 the parties stipulated that the motion for new trial might be heard and decided in vacation as of term time, and that exceptions to the ruling thereon might be taken and allowed as of the April Term, 1907. (p. 19.)

The court in which all the proceedings above re-

cited were had was held by the Hon. George D. Gear. Judge Gear was appointed on March 2, 1901, for a term of four years. (pp. 62, 109.) Some time before the expiration of his term he left the Hawaiian Islands and went to San Francisco.

On February 27, 1905, Judge Gear cabled from San Francisco to the clerk of his court this message:

> "In Territory *vs.* Cotton order motion for new trial granted. Grounds mailed. Gear, Judge."

On the same day this message was received by the clerk, who thereupon entered upon his minutes the fact that the message was received and set out its contents. (pp. 21, 45, 50, 62.)

On March 3, 1905, the clerk received from Judge Gear a letter, postmarked at San Francisco on February 25, and enclosing a decision in this case by which a new trial was ordered. (pp. 21, 22, et seq., 50, 62.)

On April 14, 1905, Judge Gear's successor, the Hon. Alexander Lindsay, having qualified on the preceding 20th of March (p. 50), the defendants moved for the entry of a formal order of a new trial. (pp. 32, 33, 51.)

On July 17th, this motion was granted, and the order was entered on the following day, the 18th of July, 1905. (p. 33.) To this action the plaintiff took an exception, memorandum of which was filed in the cause on the next day. (p. 34.)

On August 5, 1905 (pp. 34, 38), the territory filed the draught of a proposed bill of exceptions, professing to recite the history of the cause down to the entry of the order for a new trial. To the allowance of

this bill the defendants objected on several grounds, principally because the statements therein made were not conformable to fact. (p. 38.) After a hearing before Judge Lindsay, that officer filed, on December 19, 1905, an order sustaining some of these objections and overruling others. (p. 40.)

The court, however, did not sign the proposed bill. The territory, on January 9, 1906, moved for a settlement of the bill (p. 41), which motion was, after argument, on January 12, 1906, overruled. (p. 46.)

On January 17, 1906, the plaintiff filed in the Supreme Court of the Territory a petition for a writ of error to the Circuit Court, commanding the clerk of that court to certify the record in this case, including the certified transcript of the evidence and the other proceedings had in the Circuit Court. (pp. 47, 51). The writ of error was allowed on the same day. (pp. 56, 57.)

The defendants moved to quash this writ, on the grounds, among others, that there was no final judgment in the case, that the order for new trial was not reviewable, and that the writ was prayed too late—that is, not within six months from the date of the order of a new trial. (p. 59.)

The opinion of the Supreme Court on defendants' motion to quash was rendered on March 8, 1906. It is set out in the record at pp. 60 *et seq.*, and is reported in 17 Hawaiian, 445.

The Supreme Court overruled the motion to quash on the ground that the Circuit Court had no jurisdiction to grant a new trial, it being ruled that section 1805 of the Revised Laws made the filing of a bond a jurisdictional requisite to the entertainment of a motion for new trial.

Upon a motion for rehearing the Supreme Court adhered to its opinion (p. 72), and the order of a new trial was reversed on April 14, 1906. (p. 79.)

On the same day, April 14th, the defendants took steps to obtain an appellate review of the merits of the cause by perfecting their bill of exceptions taken at the trial. (p. 80.)

By the local statute, every bill of exceptions must be filed in the court within twenty days after the final judgment, or such further time as may be allowed by the court: Revised Laws, section 1864: Rec., p. 129.

On June 8, 1904, on the first day after the judgment was entered, the defendants had filed with the clerk of the Circuit Court the draught of a bill of exceptions (p. 17), and this proposed bill was placed in the hands of Judge Gear either on that day or between that day and the 14th of the same month. The delivery of this paper to the judge before the 14th of June, 1904, is proven by the testimony of Judge Gear himself (p. 110), and by other evidence (pp. 100 et seq.), and is found as a fact by the Supreme Court of the Territory. (p. 129.)

The proposed bill filed on June 8, 1904, states that,

> "At the time of the rendition of the said verdict, to wit, May 26, A. D. 1904, the defendants excepted to the verdict as contrary to law and the evidence."

It then avers that certain exceptions were taken at the trial upon matters of evidence and instruction, all of which, it is stated—

> "Appear on the transcript of the record made from the stenographer's notes at the trial."

The bill proceeds:

> "The pleadings, exhibits, and transcript of the record are hereby referred to and made part of this bill of exceptions." (p. 17.)

On June 9, 1904, upon motion, the Circuit Court entered an order that the defendants have—

> "Ten days from dated [the date?] of filing transcript of record herein to file a further bill of exceptions taken and allowed in said cause, as shown by the said transcript." (p. 19.)

And on July 18, 1904, it was stipulated by the parties, with the approval of the court, that the defendants—

> "May have 10 days from and after the decision of the court on defendants' motion for a new trial, within which to file their bill of exceptions herein." (p. 20.)

The motion for a new trial was not finally disposed of until April 14, 1906, as hereinabove stated.

When the "transcript of record" was filed does not appear.

The defendants having, on April 14, 1906, moved for leave to amend their original bill of exceptions by drawing out the same, and incorporating therein the transcript of the testimony and other matters indicated by reference in the original bill, the Circuit Court, on April 17, entered an order allowing them ten days from that date to file "any further or other

bill of exceptions," provided it should appear that they had a right to file such bill. (p. 83.) This allowance was afterward extended to include the 1st of May. (p. 99.)

Counsel for the Territory opposed the amendment of the bill, on the ground that the original bill had not been presented to the court within the statutory limit of time. (p. 84). On this matter of fact the testimony of Judge Gear and others was taken, and is preserved in the record: pp. 100 *et seq.* The Circuit Court heard argument on the point at several sessions, found as a fact that the original bill was filed and submitted in due season, and allowed the amended bill to be filed. (pp. 97, 98, 99.)

Defendants filed their amended bill on April 30, 1906 (p. 93), and the same was signed by the court on May 3, "as of the April Term, A. D. 1904," the term at which the cause was tried. (p. 93.)

Upon the docketing of the cause in the Supreme Court of the Territory, counsel for the plaintiff territory moved to dismiss the amended bill of exceptions upon the grounds, in substance: First, that the original bill had not been filed in time; second, that the original bill did not contain any valid or available exceptions, and, third, that the original bill could not be amended, as had been done, so as to incorporate therein, in extended form, the exceptions indicated by reference to the transcript of the proceedings at the trial. (p. 125.)

On hearing this motion, the Supreme Court found as matter of fact that the defendants' original bill had been filed in due time; that the transcript of the evidence and other documents mentioned in that bill were sufficiently made a part of the bill by reference;

and that the exception taken to the verdict was sufficiently stated. The court, however, held that the reference made in the original bill to "certain exceptions" taken at the trial and appearing in the transcript of the stenographer's notes, did not amount to an incorporation of the exceptions into the bill, and that the amendments to the bill had not been made within the extension of time granted for that purpose.

From which the court held it to be result that the only exception which could be considered was that taken to the verdict. (pp. 128, 129, 130; 17 Hawaiian, 608.)

Thereafter, on September 7, 1906, the Supreme Court delivered a final opinion on the merits, so far as the merits were presented by the exception to the verdict, and held that the evidence was sufficient to justify the finding of the jury. (pp. 141 *et seq.*)

Judgment that the exceptions be overruled was accordingly entered on September 27, 1906. (p. 159.)

Thereupon, the defendants in the Territorial Court sued out this writ of error.

ASSIGNMENT OF ERRORS

It will be submitted that the Supreme Court of the Territory of Hawaii erred:

1. In assuming jurisdiction to review, upon the plaintiff's writ of error, the order of the Circuit Court granting a new trial.

2. In not quashing or dismissing the plaintiff's writ of error by which it was sought to bring in re-

view the order of the Circuit Court granting a new trial.

3. In reversing the order of the Circuit Court granting a new trial.

4. In refusing to consider the exceptions contained in the defendants' amended bill of exceptions after the first.

5. In overruling the exceptions of the defendants.

6. And in other matters assigned for error in the assignments of errors filed by the plaintiffs in error in the Supreme Court of Hawaii and in this court. (pp. 163, 176.)

ARGUMENT

By an Act of Congress, approved on March 3, 1905, section 86 of the former Act providing a government for the Territory of Hawaii is amended by the addition of the following clause:

> "Provided, That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars." (33 Stat. at L., p. 1035.)

It will be observed that this enactment, which is a proviso attached to section 86 as originally enacted,

creates a new right of appellate review, which is additional to and independent of the right as before defined.

This new provision is not, by its terms at least, limited to cases in which final judgments are entered, but extends to "all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars." It may, therefore, be a question whether it is necessary in any case that the record shall show a final judgment.

In this case, however, it will be shown that there are, not one, but two final judgments, to either or both of which a writ of error from this court may run under this statute.

The first of these is the final entry in the Supreme Court of Hawaii by which the exceptions of the plaintiffs in error were overruled. (p. 159.)

The other is the previous judgment of the same court on April 14, 1906, reversing the order of new trial previously made in the Circuit Court. (p. 79.)

I

THE ORDER ON EXCEPTIONS WAS A FINAL JUDGMENT

The opinion of the Supreme Court of Hawaii upon defendants' bill of exceptions was rendered and filed in the clerk's office on September 27, 1906. (p. 155.) The last sentence of the opinion is:

"The exceptions are overruled." (p. 155.)

On the same day an entry was made upon the minutes of the court in these words:

> "The exceptions are overruled. J. A. Thompson, Clerk Supreme Court." (p. 159.)

Although it does not appear from the transcript filed here that this minute entry was even drawn out into a more formal judgment, it is submitted that the entry itself is a sufficiently formal judgment for the purpose of the present writ of error.

That this action of the court, whether called a judgment or something else, was final, is of course not to be doubted. The overruling of the defendants' exceptions left the original judgment in full force and effect, not only unreversed and unsuspended, but beyond the possibility of reversal or suspension by any act of any court in Hawaii. The order of the Supreme Court left nothing to be done in respect of the judgment except execution according to its terms; so that the order is clearly not in any sense or degree interlocutory. It is clear, therefore, that, if this order is a judgment, there is no room to question its entire finality.

The only question anticipated is as to whether the final order entered in the Supreme Court of Hawaii is, technically, a judgment.

That the minute entry was, according to the local practice and the usage of the Supreme Court, a final judgment, is manifestly the opinion of the Supreme Court itself. Indeed, the chief justice of that court has in effect said so in this record.

On October 4, 1906, seven days after the entry above set out, counsel for defendants, now plaintiffs

in error, filed a petition for a writ of error in the Supreme Court, and addressed, of course, to the very court by which the entry had been ordered. In this petition, it was alleged:

> "That on the 27th day of September, A. D. 1906, the Supreme Court of the Territory of Hawaii rendered a final judgment in the above cause." (pp. 159, 160.)

In the same petition, the same entry is twice again mentioned as a judgment.

Upon this petition the chief justice of the court, one of the judges by whom the order had been rendered, allowed the present writ of error. (p. 160.)

On the same day, the same chief justice approved a bond in error, in which bond it is recited that a judgment had been rendered in this cause. (pp. 161, 162.)

Again, on the same day, the same chief justice signed the writ of error, in which it is mentioned that a judgment had been rendered in this action by the Supreme Court of the Territory (p. 168), and also a citation in which again mention is made of a judgment rendered. (p. 169.)

The Chief Justice of the Supreme Court of Hawaii may be presumed to know what constitutes a judgment of that court, and to be an authority as to the local practice and particularly the practice of his own court. These several signatures of his, attached to several documents which directly state or incidentally mention the existence of a judgment, are in effect so many certificates that a judgment was entered.

The question, what amounts to a judgment, is, of course, one of local practice. If by accepted usage in Hawaii, or in the Supreme Court of the Territory, such a minute entry as appears in this record is regarded as a judgment, then that entry, however meager or technically irregular, may, and should be accepted as a judgment of that court.

A judgment which the Supreme Court of a State holds to be a final judgment can hardly be considered in any other light by this court:

> Belmont Bridge *vs.* Wheeling Bridge, 138 U. S., 287.

> "With the peculiarities of the practice of the Indiana courts, we have nothing to do. If, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that State, it is no concern of ours. If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, subject, in a proper case, to our review, whatever may be its technical designation."

> Tippecanoe Co. *vs.* Lucas, 93 U. S., 108.

Independently of any peculiar local practice, and as a principle of the general law of judgments, the entry in the minutes of September 27, 1906, is the entry of a judgment, though never drawn out into the formal words of a judgment.

In most, probably all, jurisdictions, it is the practice to record all judgments and other orders of the court, at the time they are pronounced, by a minute entry or memorandum in the form of the minute shown by this record. At some later time, at the convenience of the clerk, these minutes are drawn out into formal entries upon the permanent records of the court. It is, of course, immaterial when the formal records are prepared, or how much time may elapse between the notation of the judgment and the recording of it in expanded form, since the latter is a merely ministerial act of the clerk, which is in practice often deferred until after the close of the term, and sometimes dispensed with altogether.

The judgment, being the act of the court, and the substantial thing, of which the expanded entry is mere form and dress, becomes a judgment when it is pronounced and directed to be recorded, or, at all events, so soon as the first notation is made. The date of the judgment is the date of the minute entry; it is then immediately executionable, unless otherwise provided by statute; and all the rights of the parties depend upon and relate to the original minute and not to the later formal entry on the permanent records.

> "The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A judgment is not what is entered, but what is ordered and considered. The entry may express more or less than was directed by the court, or it may be neglected altogether; yet in neither of these cases is the judgment of the

court any less its judgment than though it were accurately entered.

"That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity. It is, therefore, not indispensable to the validity of an execution and a sale made thereunder that the judgment should have been actually entered before the writ issued."

Freeman on Judgments (4th ed.), s. 38.

"The authority of the clerk to make this formal entry is founded on a judgment already valid, and whose validity is not destroyed by his failure to enter it.

"A judgment drawn up in the form in which it was intended to be entered, signed by the judge and filed in the cause, is the judgment of the court at that time and of that term, although execution should not be issued upon it then.

"The action of the clerk, being non-judicial, may take at any time afterward. The usual custom, perhaps, is for him to wait for leisure moments to perform that duty. In many cases the record is not completed until after the adjournment of the term. And this practice seems to have prevailed at common law."

Freeman on Judgments, s. 40.
Casement *vs.* Ringgold, 28 Cal., 335.
McMillan *vs.* Richards, 12 Cal., 467.

It is, therefore, immaterial whether or not the judgment is ever spread out upon the formal minutes. The neglect of the clerk to mould the original notation into the conventional form of judgments, and to clothe it with the language generally used for that purpose, is the neglect of a purely ministerial duty which does not at all impair the validity of the judgment minuted.

In some of the States no record is ever made up, that is to say, the original minute entries are not drawn out into formal orders and judgments. Such is, or at one time was, the usage in Maryland and Pennsylvania, and it was so formerly in the District of Columbia. In such jurisdictions the files and journal entries stand in place of the record, and memoranda indicating the rendition of judgments are treated as judgments:

> Packet Co. *vs.* Sickles, 24 How., 340.
> Cromwell *vs.* Bank, 2 Wall., Jr., 569.
> Boteler *vs.* State, 8 Gill. & J., 381.
> Ruggles *vs.* Alexander, 2 Rawle, 232.
> Freeman on Judgments, s. 86.

As Mr. Freeman says, it has long been agreed that—

> "While the entries and memoranda gave data from which a record as technical and prolix as any ever drawn in the court of King's Bench could be readily constructed, they ought to be regarded as competent and satisfactory evidence of the judgment, and of such other judicial proceedings as were necessary to support it."
>
> Freeman on Judgments, s. 86.

Since the same omission to spread judgments in extended form upon the minutes appears to be according to the usage of the Hawaiian courts, the notation of the final action of the Supreme Court of the Territory should be taken as the final judgment in this case.

II

THE JUDGMENT ON NEW TRIAL IS REVIEWABLE IN THIS COURT

The action of the Territorial Supreme Court whereby it undertook to reverse Judge Gear's order of new trial was taken by the entry of a formal judgment. (p. 79.)

In respect of this judgment, there being no room for doubt as to its regularity in point of form, the only possible question is as to whether or not it is of such character as to be subject to appellate review in this court.

Orders granting or denying new trials, while generally not the subjects of error, may be reviewed and reversed in error when they are void as being beyond the jurisdiction of the court assuming to make them:

Hume *vs.* Bowie, 148 U. S., 245.
Coughlin *vs.* D. C., 106 U. S., 7.

In the former of these cases, the order of the lower court granting a new trial was brought to this court upon a writ of error. Motion was made to dismiss the writ on the ground that the allowance of a new trial was not within the appellate jurisdiction; but

upon this point it was said by Mr. Chief Justice Fuller:

> "The question involved is one of power, for if the court had power to make the order, when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable."

And such an order may be revised in error when it appears that the lower court in acting upon the motion for a new trial proceeded upon an erroneous theory of its powers and duties in the matter or upon incorrect principles of evidence and practice:

> Metropolitan R. R. Co. *vs.* Moore, 121 U. S., 358.
> Mattox *vs.* United States, 146 U. S., 140.

In this case, the Territorial Supreme Court, as appears from its opinions in the record (pp. 60, 72), adopted the principle just stated as the basis of its decisions, and held itself warranted to reverse the order of new trial upon the sole ground that the trial court was without jurisdiction to make it, such an order being otherwise, concededly, not within the appellate jurisdiction of the court.

That court holds, as a matter of general law and local practice, that the order of a trial court upon a motion for new trial is discretionary and cannot be

revised in error. Its action in this case is held to be justified by the holding that the trial court was without jurisdiction to make the order because the moving party failed to comply with a local statute requiring a certain bond to be given; and this is supposed to entitle the appellate court to reverse the order so reduced to a nullity. And for this proposition, Hume *vs.* Bowie, *supra*, and other cases, are invoked as authority.

Upon the same principle it will here be submitted that the action of the Supreme Court of the Territory upon the matter of new trial is reviewable in this court, and should be reversed, because the order of that court was beyond its jurisdiction to make and therefore void.

The action of the Territorial Supreme Court was beyond its authority for each of two reasons:

1st. The appellate jurisdiction of that court was invoked too late and attempted to be exercised after the time to which it was limited by statute; and,

2d. The order of new trial was, by reason of its nature and because it was an order of new trial, not within the appellate jurisdiction, but altogether within the discretion of the trial court; and because the Territorial Supreme Court erred in holding that the order was void and therefore excepted from the general rule of the subject.

Whether the Supreme Court of the Territory was right or wrong in its view of the order of new trial, its judgment reversing that order is reviewable in this court. If the order was a valid order then the

judgment of the Supreme Court must fail of validity because of the error in pronouncing it void. If the order was, as it was held to be, void, then the jurisdiction of the Supreme Court of the Territory to declare it so is a question upon which this court is entitled to pass. And in either case, the question, whether the order of new trial was void or merely erroneous, is one presented by the record and is within the jurisdiction of this court as defined in Hume *vs.* Bowie and other cases to like effect.

III

JURISDICTION OVER THE ORDER WAS LOST BY LAPSE OF TIME

By section 1869 of the Revised Laws of Hawaii, it is provided:

> "A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge or magistrate, or by the decision of any court except the Supreme Court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of the judgment."

By this section the power of the Supreme Court of the Territory to grant a writ of error is limited to a case wherein the writ is sued out within six months after rendition of the judgment or other decision sought to be reviewed.

That the limitation of six months for the allowance of a writ of error is jurisdictional, appears

clearly from the connection in which it is found. The right to the writ is created by this enactment, and the clause of limitation is embodied in the very provision by which the right is given. The case is, therefore, within the familiar rule that, where a power or privilege is made by a statute, and is by the same statute limited in respect of time, or in any other respect, a party who asserts such a right must show that he is within the statutory limitation.

Authorities to this point are numerous and uniform:

> The Harrisburg, 119 U. S., 199.
> Hudson *vs.* Bishop, 32 Fed. Rep., 519.
> Smith *vs.* Tripp, 14 R. I., 112.
> American & Eng. Encycl., 1st ed., v. 13, p. 689.

In cases arising under such statutes, the party claiming the right created must affirmatively show himself within the limitation. Such seems to be the rule in Hawaii under this particular statute:

> Cummings *vs.* Iaukea, 10 Haw., 1.

It becomes material, therefore, to determine the date at which Judge Gear's order of new trial became effective so that time for proceedings in error commenced to run upon it.

Application for writ of error was not made until January 17, 1906, (pp. 47, 51), and the writ was allowed on that day. (p. 56.)

This was ten months and twenty-one days after the entry of the order of new trial which was sought to

be reviewed, the date of that entry being February 27, 1905.

It was more than ten months after the receipt and filing of Judge Gear's opinion in support of his allowance of a new trial. It was more than nine months after April 14, 1905, on which day the defendants had applied for a formal entry of the order of new trial. (p. 32.)

It was exactly six months from July 17, 1905, on which day the original order of Judge Gear, made in the preceding February, was drawn out in form on the minutes by the authority of Judge Gear's successor, Judge Lindsay. (p. 33.)

In order, therefore, to give to the Supreme Court of the Territory any jurisdiction at all to review Judge Gear's order, the plaintiff was, and is, obliged to establish the date of that order as July 17, 1905, whereas it is evident that the order was, and could be, dated and effective only from the day, nearly five months earlier, when it was made and entered.

Without any disrespect to the Supreme Court of the Territory, it may be remarked that that court seems in its opinions, not to appreciate the gravity of the question as to its own jurisdiction upon the plaintiff's writ of error. In the first opinion on defendant's motion to quash the writ, nothing at all is said about the lapse of time (pp. 60 *et seq*); and in the decision of the court upon the rehearing, it is said to be conceded that the writ was brought within the statutory limit. (pp. 21, 76.) The fact is that the defendants had objected to the writ as taken out of time in no less than four of the grounds assigned for their motion to quash the writ. (p. 59.)

Even supposing that the defendants' counsel had, at the hearing of the motion to quash, abandoned the objection predicated upon lapse of time, the objection was one which went to the jurisdiction of the court, and which, therefore, could not be waived by any mere admissions of counsel. The court itself was bound to notice the limits of its own jurisdiction, and the more so in this case because the objection was distinctly raised upon the record.

That the order of new trial must date from the day on which it was received, filed and noted upon the minutes, seems too plain for question.

The order of new trial, which the plaintiffs' writ of error sought to review, was cabled from San Francisco and received by the clerk at Honolulu on February 27, 1905. On the same day the clerk made an entry in the regular minute book of the court, the entry being entitled as of this cause, stating the fact that this cable message had that day been received—

> "And filed of record in this case in the clerk's office,"

and setting out the message *in haec verba*:

> "In Territory *vs.* Cotton order motion for new trial granted. Grounds mailed. Gear, Judge." (pp. 21, 45.)

The authorities already cited, under the first head of this argument, establish the proposition that a judgment or other order of a court is sufficiently made, recorded, and evidenced, by the minute entry which is noted upon the journal contemporaneously

with the pronouncing of the judgment or order. Although it is, in general, customary to draw out this minute into more expanded form for entry upon the permanent records of the court, that is a merely ministerial duty of the clerk, which he defers to a later and more convenient time, and which may be altogether omitted without impairing the validity or sufficiency of the order as originally noted.

The effective and substantial fact in such matters is the order itself as evidenced by the original notation, and to this the subsequent more extended recordation is only incidental and adventitious. The contemporaneous minute, however meager it may be, is the primary evidence of the order, and is of intrinsic and paramount authority, since it is the very material out of which the formal record is made and upon which the extended order depends for its authority. A record is defined to be, "a contemporaneous official minute in writing."

Stephen on Pleading (Tyler's Ed.), 60.

The date of a judgment or other judicial order is, therefore, the day upon which it is rendered or made and is noted upon the journal, and not some subsequent date when the order is clothed in more ample language for extended recordation.

It would be, not only contrary to authority and settled usage, but also productive of the greatest inconvenience, and even dangerous, to hold that the rights of a party under a judgment or a decree depend upon, and date from, the time at which the clerk finds it convenient to make the fuller and more formal entry of the judgment or the decree upon his records.

In this case, actual notation of Judge Gear's order was made upon the minutes of the court on February 27th, the very day upon which the order was made and notified to the clerk. The order itself was in writing, being a written cable message, as to the authenticity of which there has never been any dispute; and it was physically filed in the archives of the court as a voucher for the entry made upon the minute book. And thereupon the fact that the court had granted a new trial was made a matter of public record. Upon what possible theory can it be contended that the action of the court was not taken then, but at some later date?

Manifestly, not because the judge's opinion was filed a few days after. The opinion was no part of the order, and was in no way material to the effect of the order. And, even if it were, since the opinion was actually filed on the 4th of March (p. 32), a reckoning from that date would not bring the transaction within six months of January 17, 1906, when the writ of error was applied for.

The theory of the plaintiff, and of the Supreme Court of the Territory, seems to have been that the order granting a new trial should be treated as dating from July 17, 1905, the day on which Judge Lindsay authorized a formal entry of Judge Gear's original order. (p. 33.)

The vice of this theory is, that it makes the validity, and indeed the very existence, of the order dependent, not upon a sufficient contemporaneous entry of the order, but upon the subsequent drawing out of that entry into more expanded and formal words. And this, upon principles and authorities already mentioned, is an erroneous view of the formal entry which in this case was made on July 17, 1905.

The true view is that the entry made in July was merely the proper and necessary consequence of Judge Gear's order made and noted in the preceding February. It was the duty of the clerk, as a matter of routine duty, to make a formal recordation of the previously valid and effective order. The validity of the order rests upon Judge Gear's original authorization and not at all upon the performance of the clerical duty flowing therefrom.

> "It follows from this that a clerk who has failed to enter judgment within the time directed has omitted to perform his duty at the most appropriate time, but that its performance is still due from him, and he should proceed with it, notwithstanding the lapse of time designated in the statute.
>
> "When he does enter the judgment, it is as valid as if entered in due time, though in the meantime the judge who pronounced it has gone out of office."

Freeman on Judgments, s. 39.
Bundy *vs.* Maginness, 76 Cal., 532.
Waters *vs.* Dumas, 75 Cal., 563.
Crim *vs.* Kessing, 89 Cal., 478.

The utmost that can be accorded to Judge Lindsay's order of July 17, 1905, by which the clerk was directed to enter in form the allowance of a new trial, is that it was a *nunc pro tunc* order which related to the date of the original ruling on the motion made in the preceding February. The authority to make the formal entry was derived from Judge Gear, and the entry when made was but the execution of Judge

Gear's order. The action of Judge Lindsay, five months later, was purely formal, unnecessary, and of no bearing upon the merits of the case.

That this is so, appears also from consideration of the fact that Judge Lindsay, even had he been so inclined, could not, in July, have vacated Judge Gear's order of February 27th, because that order had become final by the lapse of the term at which it was made.

The terms of the Circuit Court at Honolulu begin on the first Mondays of January, April, and September. Each term runs to the commencement of the next, except that the duration of the April Term is limited to the last Saturday in June:

Revised Laws of Hawaii (1905), sec. 1644.

The order of new trial, being made at the January term, passed beyond the control of the court on the day before the first Monday in April. When Judge Lindsay was called upon to act in the matter, in July, the April term had intervened, and had closed by statute on the last Saturday of June. Judge Lindsay, therefore, had no authority to vacate the order of Judge Gear, and the only action he could take was to allow that order to be formally entered.

An order granting a new trial having been made at one term, the court cannot, at a subsequent term, rescind the order and enter judgment on the verdict:

Brooks *vs.* Hanauer, 24 Arkansas, 174.
Wells *vs.* Melville, 25 Texas, 337.
Cooms *vs.* Hibberd, 43 Cal., 452.
Becker *vs.* Sauter, 89 Ill., 596.

Where a verdict has been set aside by the judge presiding at the trial, another judge has no power, at a subsequent term, to vacate the order of new trial and reinstate the verdict.

Lavell *vs.* Gold, 25 Grattan, 473.

The entry of July 17, 1905, being thus a *nunc pro tunc* entry for the preceding 27th of February, the order of new trial must stand as of the earlier date.

The time for seeking appellate review runs, therefore, from the date of the original entry, and not from the 17th of July, when that entry was drawn out into expanded form.

It results that the Supreme Court of Hawaii erred and proceeded without jurisdiction, in assuming to reverse the order of new trial, since the writ of error was sued out to that end more than six months after the date of the decision complained of, and that fact appeared on the record brought into court by the writ of error.

It will be observed that the writ of error, in cases where such writ is authorized, is required by the terms of the statute to be taken out "within six months from the rendition of the judgment."

Under statutes of identical tenor, the rendition of a judgment is held to date, for purposes of appeal and error, from the original notation, and not from the later extended entry.

> "As the judgment is final before its formal entry in this book, a statute providing that an appeal may be perfected within a specified time from the 'rendition' of the judgment certainly

> commences to run from the time of the drawing up and signing of the judgment, and filing it among the papers in the case."

Freeman on Judgments, s. 40.
Gray *vs.* Palmer, 28 Cal., 416.
Kehoe *vs.* Blethen, 10 Nevada, 445.

In the case arising under such a statute, the Supreme Court of California said:

> "The court announced its judgment and the order for judgment was entered in the minutes of the court on the 15th of August, 1865. The judgment was, therefore, rendered, and the time for taking an appeal commenced to run on that day."

Genella *vs.* Relyea, 32 Cal., 159.

It results that the order of new trial was rendered and became an effective order on February 27, the day Judge Gear's telegram was filed and entry thereof made upon the minutes. The period of six months allowed for proceedings in error began to run on that day and expired in August, 1905, nearly five months before the plaintiff Territory applied for its writ of error running to that order.

The authority of the Supreme Court of the Territory to review any decision by error being limited to six months, by the very statute which creates the power of such review, it seems clear that that court had no jurisdiction to examine the order, and that its judgment reversing that order is void.

Coughlin *vs.* District of Columbia, 106 U. S., 7, is directly in point. The plaintiff had recovered a judgment, which had become final by the expiration of the term at which it was rendered, and no bill of exceptions had been settled, filed, or authorized to be prepared by any order of that term. Such a bill was offered at a succeeding term and was then approved by the trial court, and upon this bill the plaintiff's judgment was reversed and a new trial ordered. The second trial resulted in a judgment for the defendant. In this court, the latter judgment was reversed, on the ground that the lower court had had no jurisdiction to vacate the former judgment, and the former judgment, in favor of the plaintiff, was affirmed.

IV

ORDERS OF NEW TRIALS ARE NOT APPEALABLE IN HAWAII

A second objection to any appellate review of Judge Gear's order, and an objection of which the Supreme Court felt the force, was the fact that the order sought to be reviewed was one in relation to a new trial, and therefore of a class not revisable in a court of error.

In all Federal courts, such orders are, of course, altogether in the discretion of the trial court, and can, in no case, be reached by a writ of error, except when the order of new trial is utterly void for want of power in the court to make any order at all.

The same is the rule of the common law, from which source the Federal doctrine on this subject is derived. And such is also the generally prevailing rule throughout the United States.

The law in Hawaii is, in respect of this matter, identical with the common law, and the law of the Federal courts. The Supreme Court, in its first opinion in this case, treats the question as one of general jurisprudence and common law, to be determined by comparison of authorities, and agrees that, generally, the action of a trial court upon a motion for new trial cannot be revised by the appellate court. (pp. 62, 64.)

The local statute law is clearly to the same effect.

By Section 1, Revised Laws of Hawaii, it is enacted:

> "The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, etc."

The provision for writs of error made in section 1869 of the Revised Laws, quoted *supra*, authorizes such writ to be issued upon "the decision of any justice, judge, or magistrate, or by the decision of any court, etc., within six months from the rendition of judgment."

The concluding clause presupposes a judgment in every case to which the section is applicable, whence it follows that a writ of error lies only in a case in which judgment has been rendered, and the word decision must therefore be understood as importing a final decision.

So it has been held by the Supreme Court of the Territory, construing this statute, and it seems to be settled law of Hawaii that a writ of error cannot be sued out before judgment, or, at any rate, until there is some final decision in the case:

Government *vs.* Smith, 9 Hawaiian, 178.
Barthsop *vs.* Coffee Co., 10 id., 398.
Territory *vs.* Ah Quong, 14 id., 108.

And in this court a similar statute is construed as importing only a final decision:

McLish *vs.* Rolf, 141 U. S., 661.

It is true that, in some cases, at least, by the local practice an order of new trial may be reviewed by the Supreme Court on exceptions, as in

Ahmi *vs.* Cornwell, 14 Hawaiian, 301.

The Supreme Court, in its first decision in this case, recognizes that the proceeding by exceptions is essentially different from that by writ of error, and that the two remedies are applicable to diverse situations and regulated by diverse principles (pp. 63, 64). In this instance, the right of the plaintiff to place the validity of Judge Gear's order before the Supreme Court upon exceptions was denied by Judge Lindsay, who refused to sign a bill of exceptions prepared for that purpose; and in this ruling of the Circuit Court, the Supreme Court of the Territory finds no error.

The writ of error was, therefore, the sole ground of

the Supreme Court's jurisdiction; and, in its opinion on that point the court says:

> "On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the final judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant, as shown by the entire case.
>
> "Orders granting new trials are no doubt of an interlocutory nature, and error in general lies only to review a final judgment, and we accordingly hold that ordinarily an order granting a new trial cannot be brought up immediately by writ of error." (p. 64.)

Such being the law of Hawaii, and such being the court's view of the law, there was only one ground upon which the Supreme Court could be warranted, if warranted at all, in asserting jurisdiction over Judge Gear's order, and that ground the court, erroneously as shall submit, found in the case.

Jurisdiction was assumed upon the theory that Judge Gear himself had proceeded without jurisdiction, and that his order of new trial was therefore void. Authority for this view was supposed to be found in several cases cited in the opinions, among which is:

Hume *vs.* Bowie, 148 U. S., 245.

The action of the Territorial Supreme Court reversing the order of new trial was, therefore, avowedly by

way of collateral attack. The judgment of that court, then, can be sustained only upon such a construction of the local statute as makes Judge Gear's orders an absolute nullity. Unless the want of the bond prescribed by section 1805, *infra*, rendered the order of new trial not merely erroneous, but utterly void, the adjudication of the Supreme Court itself was not merely erroneous, but in a matter concededly beyond the jurisdiction of that court.

That the Supreme Court of Hawaii erred in holding that the bond was essential to the authority of the lower court, and by consequence itself rendered a void judgment of reversal, is submitted upon the propositions which follow.

V.

THE STATUTORY BOND IS NOT JURISDICTIONAL

Section 1805 of the Revised Laws of Hawaii reads:

> "Any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security conditioned for the payment of all costs of the motion in case he fail to sustain the same, and that he will not, to the detriment of the plaintiff in the action remove or otherwise dispose of any property which he may have liable to execution on such judgment, and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after the rendition of the verdict or judg-

ment for a new trial, for any cause for which, by law, a new trial may, and ought to be, granted. The filing of the bill of exceptions and bond shall operate as a stay of execution until the motion is determined."

The verdict in this case was rendered on Friday, May 27, 1904. The motion for new trial was filed on Tuesday the 31st. As the 29th was Sunday, and the 30th a legal holiday, the motion was made well within the four days allowed at common law for such motions.

In making the motion, as appears from an uncontradicted affidavit (p. 13), and as is found by the Supreme Court (p. 61), the defendants paid all the accrued costs and made a deposit sufficient to cover the costs of the motion.

Judgment was not entered until June 7. On that day the defendants executed a bond in the statutory form, which bond was approved by the court on the same day and filed on the day following (p. 16). At the same time, they renewed their motion for new trial and gave due notice thereof. (p. 14.)

The opinion of the Territorial Supreme Court was that section 1805 limits the time for moving for new trial and giving bond to ten days from the verdict. That court holding also that the bond is a jurisdictional prerequisite to the allowance of a new trial, it was deduced that the Circuit Court had no authority to entertain defendant's motion in the absence of a bond filed within that period. Thereupon, it was adjudged that the whole proceeding upon the motion was *coram non judice*, and Judge Gear's allowance of a

new trial was, without regard to the merits of the matter, void. (pp. 60, *et seq.*)

Because Judge Gear's order was void, it was held that, notwithstanding it was in reference to a new trial, it could be reviewed by the appellate court. (pp. 60, *et seq.*)

That the Supreme Court of Hawaii erred in holding that the bond presented by section 1805 is jurisdictional, is submitted upon the two grounds which follow, either of which is believed to be sufficient to demonstrate the error.

I. If that construction of the statute is correct, it results that the trial court is without authority to grant a new trial of its own motion.

If section 1805 is the only authority for the allowance of new trials, and if that provision is exclusive of all others, then the trial court is shorn of its inherent common law power to vacate verdicts in its discretion and in the interests of substantial justice. In that conception of the statute law of Hawaii, a trial court cannot rectify any error of a jury, however gross, or even the errors of the court itself, however apparent they may be upon mature reflection.

In this case, Judge Gear filed an elaborate opinion in connection with his order for new trial, in which opinion the judge reviews and analyzes the evidence and finds it insufficient to entitle the plaintiff to recover (pp. 22-23). The concluding sentence of the opinion is this:

> "It seems to me that the court erred in failing and refusing to instruct the jury to return a verdict for the defendants, and for this reason a new trial should be ordered." (p. 32.)

The proposition, then, is, that Judge Gear, upon discovering that he had committed an error to the prejudice of the defendants, was powerless to remedy his own injury because the defendants, upon the doubtful construction of an obscure statute, had delayed one day too long to file a bond.

That such a conception of the duty and power of a trial judge is essentially at variance with the principles accepted in Federal jurisprudence as governing the subject, goes without saying. It is not only the right but the duty of the judge, in United States courts, to exercise such control over the deliberation and verdicts of juries as shall insure the attainment of justice and conformity to law.

> "At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of the one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."
>
> Patton *vs.* Rwy. Co., 179 U. S., 660.

The power of a Federal court to withdraw a question of fact from the jury and to direct a verdict

either for the plaintiff or for the defendant, where the evidence justifies such a direction, is, of course, beyond question:

R. R. Co. *vs.* Converse, 139 U. S., 469.
Elliott *vs.* R. R. Co., 150 U. S., 245.
Anderson Co. *vs.* Beal, 113 U. S., 227.
R. R. Co. *vs.* McDonald, 152 U. S., 262.
S. P. Co. *vs.* Pool, 160 U. S., 438.
Patton *vs.* Rwy. Co., 179 U. S., 658.

Or, in a proper case, to enforce modification of the verdict by the exercise of the power of granting new trials:

R. R. Co. *vs.* Herbert, 116 U. S., 642.

The ordering of a new trial is the positive duty of the court in a case wherein the jury have found against the evidence: "It would be error on their part," says Mr. Justice Story, referring to the jury, "which would require the remedial interposition of the court."

Kelly *vs.* Jackson, 6 Peters, 632.

In other jurisdictions, and as a matter of general and common law, the power of a trial court to grant a new trial of its own motion, whether or not application to that end be made by the parties, seems to be generally recognized:

Ry. Co. *vs.* Donovan, 110 Mich., 173.
Ensor *vs.* Smith, 57 Mo. App., 584.
Weber *vs.* Kirkendall, 44 Nebr., 766.
Anderson *vs.* Fox, 2 Hen. & M., 245.

Nor does the existence of statutes, providing for the particular causes, modes of procedure, and conditions, in respect of granting new trials, detract from the inherent power of the courts to act in that matter of their own motion.

The fact that a statute provides for the granting of a new trial upon the motion of one of the parties, does not deprive the court of its inherent power to set aside a verdict of its own motion, and the court may do this independently of a motion made by a party or in the absence of such motion:

> Allen *vs.* Wheeler, 54 Iowa, 628.
> Hawkins *vs.* Printing Co., 29 La. Ann., 134.
> Ellis *vs.* Ginsburg, 163 Mass., 143.
> Schmidt *vs.* Brown, 80 Hun., 183.

Such seems to have been the view heretofore taken of the law on this subject in Hawaii, and the ruling of the Supreme Court in this case appears to have been at variance with prior decisions of the same court and with the settled practice of the territorial courts.

In Republic *vs.* Tokuji, 9 Hawaiian, 548, the Supreme Court of Hawaii said:

> "But we are of opinion that, under the Judiciary Act of 1892, the circuit courts are courts of general and unlimited jurisdiction, clothed with powers inherent in such courts, one of which powers is that of granting new trials."

Again, in Harrison *vs.* Magoon, 16 Hawaiian, 179, it is said by a member of the court in a concuring opinion:

> "But I think that the power of the circuit courts to grant new trials in cases of non-suit is found in the common law of Hawaii, and not in the statute. The power of the circuit courts at *nisi prius* to grant new trials of civil causes in certain cases not provided by statute has been so long recognized by this court as to become the common law of Hawaii."

2. The statutory requirement of a bond is not of a jurisdictional character.

As a general proposition, it may be said that no statutory requirement of anything prescribed as incident to litigation makes the thing prescribed essential to the jurisdiction of the court.

Jurisdiction over the subject-matter of the cause is not, of course, dependent upon anything except the statutes which create the courts and define their jurisdiction. The jurisdiction over the particular suit is conferred by the pleadings; and the jurisdiction over the persons is acquired by the service of process or by the proper statutory substitute for process.

It is plain that the giving of a bond, or the doing of any other specific act required by statute, can not confer jurisdiction in respect of any of these three elements of jurisdiction, and that the omission to comply with any such requirement can not impair jurisdiction already vested by the appropriate means to that end. Excepting exceptional cases of special proceedings, such as attachment, condemnation and the like, wherein as an additional element of jurisdiction the possession or control of specific property is requisite, what other element or basis of jurisdic-

tion is there to which the giving of a bond is essential, or which can be said to be wanting if a bond or some like statutory matter is omitted?

No doubt, in many or most cases in which a statute prescribes that something shall be done by one party or the other in order to entitle him to effect some purpose or to demand some action of the court, it is error for the court to proceed without compliance with the statutory requirement. But, the concession that in this case the trial court erred, if such concession could be made, would not meet the exigency of this judgment, because, as is said by the court itself, the action of the Territorial Supreme Court can be sustained only upon the theory that the order of new trial was an absolute nullity for want of the bond, and therefore subject to reversal upon collateral examination.

Comparison of the statute of Hawaii with similar statutes of like tenor and identical purpose will show that the view taken by the territorial court of that provision is different from that taken by most other courts of such provisions generally.

The Hawaiian statute, taken in its most stringent sense, is no more peremptory than sections 997 and 1000 of the Revised Statutes of the United States providing, respectively, for the issue of citations and the giving of bonds in cases in error and on appeal in the Federal courts. Yet it is well settled by numerous and uniform decisions of this court that neither a citation nor a bond is essential to the appellate jurisdiction.

Dodge *vs.* Knowles, 114 U. S., 430, was a case in which no citation was ever issued, and the appellee declined to appear, although expressly invited to do

so. After a decree of reversal had been entered, the appelle moved to vacate it on the ground that there had been no jurisdiction over the appeal for want of the citation. In declining to accede to this motion, the court said of the citation:

> "It is not jurisdictional. Its only purpose is notice. If, by accident, it has been omitted, a motion to dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was made after the expiration of the two years from the rendition of the decree or before.
>
> "Here, before the cause came on for final hearing, notice was given the appellee, by order of the court, that the appeal taken in open court was being prosecuted, and that a re-argument at an appointed time was desired. In response to this notice, the appellee declined to appear, not because he had not been served with a citation, but because no appeal had been perfected. Had he complained of a want of citation, the omission might have been supplied, if, on consideration, it should have been deemed necessary."

Of the bond, which is likewise required to be given, and to be given at a prescribed time, it is held that the giving of the bond is not essential to the taking of an appeal, though it is essential to the due prosecution thereof. If it is not given, the jurisdiction of the court nevertheless attaches, and will be exercised

unless objection is made for want of the bond, and, upon such objection made, the bond may be supplied, though the period allowed by the statute may have elapsed, though the term may have expired, though the case has been docketed in this court, or though it is too late to take an appeal or writ of error:

> Peugh *vs.* Davis, 110 U. S., 227.
> Edmonson *vs.* Bloomshire, 7 Wall., 306.
> The Dos Hermanos, 10 Wheaton, 306.

The Dos Hermanos, 10 Wheat., 306, was a case in which an appeal from a district court to this court had been prayed and allowed within the statutory period of five years allowed for that purpose, but the bond required by statute as a necessary element of such an appeal was not given until after the five years. In this court it was held that this procedure was sufficient compliance with the statutory requirement, it being said of the bond by Mr. Chief Justice Marshall:

> "But as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal. The mode of taking the security, and the time for perfecting it, are matters of discretion, to be regulated by the court granting the appeal; and when its order is complied with, the whole has relation back to the time when the appeal was prayed."

The prevailing current of authority upon similar questions arising upon like statutes is to the same

effect. In Van Fleet on Collateral Attack, sec. 292, the result of adjudication on this subject is thus stated:

> "At some stage of special proceedings, the statutes generally require the officer or party to file a bond, with certain prescribed conditions, penalty and surety.
>
> "On principle, it is difficult to see just where this bond touches the jurisdiction of the tribunal. We assume that it has power to grant the relief demanded, and that the allegations of the petition are sufficient to call that power into exercise, and that all parties in interest are before it, and that the only thing lacking to authorize rightful action is the bond. But this bond is solely for the protection of the defendant; and to permit him to contest the cause on the merits without objection in respect to the bond, and then, after he is defeated and his property sold, to allow him to recover it from an innocent purchaser, because of defects in, or the absence of the bond, seems like trifling with the courts, and certainly is a travesty on justice. Surely this bond has nothing to do with jurisdiction over the person—that is obtained by service of process or appearance; and I presume no one would doubt that the parties might effectually waive it by a stipulation entered of record, which they could not do if it were necessary to give jurisdiction over the subject-matter.
>
> "It was expressly held by the Supreme Court of Ohio that an attachment bond was designed for the exclusive benefit of the creditor; and he

might waive it, and that the proceedings were not void because of its absence. (O'Farrell *vs.* Stockman, 19 Ohio St., 296; *accord.* Burford *vs.* Cassidy, cited in Billings *vs.* Russell, 23 Pa. St., 189; Rudolf *vs.* McDonald, 6 Neb., 163, citing Ward *vs.* Howard, 12 Ohio St., 158.)

"So the failure to require an injunction bond does not make the order void so as to be no contempt to disobey it (Young *vs.* Rollins, 90 N. C., 125); and where a guardian's sale of land had be made without giving the additional bond required by statute, the Supreme Court of Iowa said:

" 'In the absence of a sale bond, it would doubtless be error to approve the sale; but where the jurisdiction attached, and the sale has been approved, it cannot, we think, be successfully attacked in a collateral proceeding.' (Hamiel *vs.* Donnelly, 75 Iowa, 93.)

"Precisely the same ruling was made in Indiana, Kansas and Ohio, and by the Supreme Court of the United States (following the last Ohio case), touching the validity of such a sale made in Ohio; and the same ruling, concerning a sale of land by an administrator without giving an additional bond, was made in Alabama, Massachusetts and Pennsylvania. (Dequindre *vs.* Williams, 31 Ind., 444; Watts *vs.* Cook, 24 Kans., 278., Arrowsmith *vs.* Gleason, 129 U. S., 86; Wyman *vs.* Campbell, 6 Porter, 219; Perkins *vs.* Fairfield, 11 Mass., 227; Lockhart *vs.* John, 7 Pa. St., 137.)

"It has been repeatedly held that the failure of an administrator or guardian to give a bond

did not make his appointment and acts void. (Leatherwood *vs.* Sullivan, 81 Ala., 458; Cuyler *vs.* Wayne, 64 Ga., 78; Russell *vs.* Coffin, 8 Pick., 143.)

"The principle, that the bond in such cases is not jurisdictional, was recognized in an early case in the Supreme Court of the United States; where a sale in partition was attacked collaterally because a bond to secure the purchase money had not been given to the heirs, in violation of a statute, but the court said the point was immaterial, as the money was actually paid. (Thompson *vs.* Tolmie, 2 Peters, 157.)"

Van Fleet on Collateral Attack, Sec. 292.

In cases of appeal, the bond prescribed by statute as a condition of the right of appeal is not essential to the jurisdiction of the court; this is expressly held in some states, and in others is implied in the holding that the bond may be waived by the appellee:

Thompson *vs.* Lea, 28 Alabama, 453.
Riley *vs.* Mitchell, 38 Minnesota, 9.

And the want of a proper bond may be waived, not by only express stipulation, but by failure to object, or even by delay in objecting, on that ground:

Frank *vs.* Thomas, 35 Ill. App., 547.
Kohn *vs.* Davidson, 23 La. Ann., 467.
Mfg. Co. *vs.* Burlingham, 137 Mass., 581.
Craig *vs.* Scott, Wendell, 35.
Wallace *vs.* Corbitt, 4 Iredell, 45.
Kirkpatrick *vs.* Cooper, 89 Ill., 210.
Shank *vs.* Warfel, 14 Serg. & R., 205.

Of course, if the statutory requirement of a bond may be waived by the party in whose interest it is provided, the bond is not essential to the jurisdiction of the court. Neither can a bond be held to be a jurisdictional matter if the want of it can be supplied, or defects in it repaired, after the date to which the jurisdiction of the court is limited. Yet, it seems well established that appeal bonds and other bonds may be thus furnished or amended.

Under statutes requiring bonds to be given in cases of appeal, it is generally held that the bond may be supplied after the appeal is taken and objection made for the want of the bond. The circumstances in which, and the grounds upon which, such perfection of an appeal, defective in respect of a statutory bond, is permitted, vary, of course, in the different states; but the power of the courts, in their discretion, and upon the showing of various matters of excuse, to accept appeal bonds, offered out of time, is quite generally recognized:

Howard *vs.* Harman, 5 Cal., 78.
Hill *vs.* Hudspeth, 22 Georgia, 621.
Stetson *vs.* Corinna, 44 Maine, 29.
State *vs.* Coahoma Co., 64 Miss., 581.
Iron Works *vs.* Brooklyn, 86 N. Y., 651.
Jones *vs.* Asheville, 114 N. C., 520.
Mills *vs.* Thurston, 11 How. Prac., 129.

VI

THE BOND IS NOT NECESSARY TO THE MOTION

The bond prescribed by section 1805, so far from being made a jurisdictional prerequisite to an application for new trial, is not, upon a fair construction of the statute, even required to be given except where a stay of execution is sought.

It is scarcely necessary to observe that this statute is far from clear either in its phraseology or as to its purpose. This feature of the enactment has been remarked by the territorial courts, and upon this ground the Supreme Court of Hawaii holds that the statute should be given a liberal construction.

> "As already intimated, the construction of these sections is not free from difficulty; and the fact that they were not drawn, as is evident, with due regard for harmony between them or for all the circumstances that arise calling for their application, justifies a more liberal construction with a view to carrying out the general intent."
>
> Harrison *vs.* Magoon, 16 Hawaiian, 177.

Upon the naked text of the statute a question might arise, and has arisen in this case, whether the provision is intended to be applicable to all cases of motions for new trials or to be only a provision for stay of execution pending the motion, of which the moving party may avail himself or not at his election.

Even the mere language of the statute, however, suggests that the enactment is intended only for the case where stay of execution is desired, and does not exact bonds in all cases where new trials are sought.

The provision is that the losing party may, upon giving a bond, move for a new trial. The act does not say that otherwise he can not do so. There is nothing in the statutory text in the way of negation, no suggestion of prescribing an exclusive method of obtaining new trial, no expressed or implied purpose to restrict the right of making such motion, which right was before common and unburdened with conditions.

As the section does not profess to establish an exclusive rule upon the subject, it may very well be limited to the particular case for which it appears to be intended, and may, by such limitation, consist very well with the continuance of the common law practice in all cases not contemplated by this provision.

At common law a defeated litigant may move for a new trial as a matter of course, as a matter of common right, and without a bond or any other condition.

By section 1 of the Revised Laws of Hawaii, *supra*, the common law is enacted as the law of Hawaii except so far as it is repealed or modified by affirmative legislation of the territory.

We have, therefore, two enactments on the subject of new trials, the rule of the common law and the special statute embodied in section 1805. Upon familiar principles of construction the two must stand together, and both must be given effect, unless

there is some necessary inconsistency between them. In that case the special statute repeals the common law only to the extent of the necessary inconsistency between them.

In this case, there is no necessary inconsistency between the two except in respect of the case where a stay of execution is to be effected. The language of the statute is certainly susceptible of a construction which will limit the requirement of a bond to that case, there being no words which import the contrary. Having regard to the ambiguity of the section, and the liberality of interpretation which the Hawaiian courts declare should therefore be indulged, any doubt should be resolved in favor of the construction which will make the provision most nearly harmonize with the common law practice, which is also a matter of statutory enactment in Hawaii.

The view taken by the Territorial Supreme Court makes this section a repeal of the whole common law on the subject of new trials. Inasmuch as the requirement of a bond is in derogation of common right as well as of common law, it is one which should not be extended except in deference to clear and express provision of some statute. This statute is, confessedly, at least ambiguous; and for that reason, if for no other, the effect given to it by the territorial court should be held erroneous if it is possible by some limited construction to reconcile this provision with the law and the rights of litigants as they stood in Hawaii before this section was enacted.

As the section is interpreted by the Territorial Supreme Court, it is a strikingly singular provision, and one of singular stringency. It is perhaps not uncommon to find in other jurisdictions requirements

for the giving of bonds in cases where stay of execution or delay of judgment is desired, or enactments prescribing other regulations intended to prevent delay, or to obviate the dangers of delay, pending motions for new trials. But it will certainly be difficult, and probably impossible, to discover anywhere another statute which denies to every litigant, and in all circumstances, the right of seeking a new trial except upon condition of giving a bond sufficient to supersede the judgment.

If this section exacts a bond in every case as the necessary condition of moving for a new trial, it applies as well to the case where the movant has no property subject to execution as to those where the judgment can be made. It results that a party who is too poor to pay the judgment, and who, by the same token, is presumably unable to give bond, must submit to any verdict which may happen to be returned against him, although the verdict may be palpably erroneous and flagrantly improper. And this, even though the court itself is never so dissatisfied with the verdict, or even grossly outraged by the misbehavior of the jury.

Inasmuch, by the local statutes, and the local practice, judgment may be entered at once upon the verdict (sec. 1804, Rev. Laws), there is in Hawaii no peculiar danger incident to motions for new trials, and no occasion for any exceptional stringency in respect of such motions generally. As neither judgment nor execution is delayed, unless a bond is given by way of supersedeas, there is no reason why the losing party should be required to supersede without regard to his wishes or ability, and even without

regard to the necessity of protecting the rights of the other party.

The singularity of the statute, and its singular and unaccountable stringency, as it is construed by the Territorial Supreme Court, are persuasive arguments against the correctness of that construction.

The statutory text lends itself readily to a different and much more reasonable construction. The section provides, in effect, that a party may, upon giving bond, move for a new trial and obtain a stay of execution. Had the order of the clauses been transposed, and had it been provided that a party might obtain a stay of execution by moving for new trial and giving the bond, the enactment would have been much more intelligible as well as more consistent with similar legislation and generally accepted principles of good practice. In such a case, no one would have doubted that the section was intended simply as a definition of the terms upon which a supersedeas might be had, and not at all an enactment in limitation of the right to move for a new trial. If, then, the obvious, or even the fairly inferable, purpose of the section is to provide merely for suspension of execution, the accidental inversion of the order in which the elements of the provision should be arranged to that end may be disregarded and treated as a mere defect in the method of expression. In that case, a merely rhetorical accident would not alter the obvious meaning of the legislature.

The provision for the stay of execution is evidently the one purpose of this statute, the objective point toward which the whole enactment moves. For a legislative regulation of the general subject of new trials, there was no necessity, the common law being

in force in Hawaii. For any special stringency or severe limitation upon the right to move for new trial, there was still less of occasion, for reasons already suggested. It is reasonable, therefore, to suppose that the one thing in the mind of the legislature, and the one motive that prompted it, in the enactment of this statute was the necessity of regulating execution in such cases and of obviating the evils and dangers incident to the protracted pendency of motions for new trials.

To this end it is provided that execution shall be stayed only upon the giving of a bond and the filing of a bill of exceptions. To give effect to this new and additional provision of the law, it is plainly unnecessary to treat it as one applicable to all motions for new trials, including those in which no supersedeas is sought.

It is not the motion which stays execution, but the bond and the bill of exceptions. The statute expressly says that "the filing of the bill of exceptions and the bond shall operate a stay of execution." There is, therefore, no necessary connection between the motion and the stay of execution, since it is only the bond and the bill of exceptions which are declared to effect the stay of execution while the motion is pending. If the bond and the exceptions are not filed, there is no stay of execution; but it does not follow that the motion may not be made and prosecuted without regard to the stay of proceedings. On the contrary, the implication is that the motion is one thing, and the supersedeas is another, and that there is no necessary connection between them. The motion may be made and considered without any bond; but, if the party desires to forestall execution,

the bond and the exceptions must be added in order to operate a stay of execution.

The section is, therefore, only a provision for supersedeas upon a motion for new trial, and not an exclusive regulation of the terms upon which that motion may be made. This interpretation is consistent with the statutory text and with the most reasonable presumption as to the legislative intent, and it reconciles an otherwise singular and unreasonable provision with the principles and practice elsewhere generally accepted as governing the matter of new trials.

VII

THE BOND GIVEN WITHIN THE STATUTORY TIME

The verdict was returned on May 27, which was a Friday. The motion for new trial was made on the following Tuesday, the 31st. The judgment was entered on June 7th, and the bond was approved on the same day. On that day, the defendants renewed their motion for new trial and gave new notice thereof. (p. 14.)

The Supreme Court of the Territory holds that the ten days allowed by the statute for the giving of the bond must be counted from the date of the verdict, and not from that of the judgment, and because in this case the bond was given on the eleventh day after the verdict, it was held that the court had no power to entertain the then pending motion for new trial, so that action thereon was utterly void.

Excluding May 29th and June 5th, which were Sundays, and May 30th, a holiday, the bond was approved

on the eighth secular day after the verdict, and actually filed on the ninth day.

In the construction of a statute of such exceptional stringency and obscure phraseology as section 1805, it may very properly be held that Sundays and public holidays should be excluded in computing the period allowed for giving the bond. As the Supreme Court of the Territory has said, in the case cited and quoted from *supra*, the doubtful language of the provision makes it one for the exercise of liberality in its interpretation. And it would be no extraordinary indulgence to hold that the days intended by the section are days upon which the courts sit, and do not include those days which are *dies non* for all other purposes of business and litigation.

It may be worthy of comment that both the judges who acted upon the motion for new trial in the *nisi prius* court were of opinion that the defendants had sufficiently complied with the requirements of the statute in the matter of time.

Judge Gear permitted the bond to be filed after judgment entered (p. 43), and Judge Lindsay was so far satisfied with Judge Gear's action that he directed the order of new trial to be spread upon the minutes (p. 33), both actions being taken over the objection and exception of the plaintiff. (pp. 43, 34.)

Mr. Hartwell, counsel for the defendants, who filed the motion for new trial on May 31st, and the bond on June 7th, was on June 15th elevated to the bench of the Supreme Court of the Territory, and was a member of that body throughout the subsequent proceedings, though, of course, not sitting in this case. (pp. 12, 118.)

But assuming that the period fixed by the statute is ten consecutive days, the defendants were within the statutory period because their bond was given on the very day of the entry of judgment. The provision of the section is that the bond may be given

> "At any time within ten days after rendition of the verdict *or* judgment."

The Territorial Supreme Court holds that the period must necessarily run from the date of the verdict, and that in this case, therefore, it could not be counted from the rendition of judgment.

This is against the very letter of the statute, and ignores the express disjunctive of the statutory language, the clear effect of which is to give the party ten days from either verdict or judgment in which to effect a supersedeas. The construction given by the Supreme Court of the Territory practically erases from the text all mention of the judgment. We can say that the leave to file a bond is limited to ten days from the verdict only by striking out the phrase "or judgment" in the two places where it occurs, and the phrase "on such judgment" which is used at another point.

The provision is by its very terms for the case of a party against whom either "a verdict *or* judgment is rendered." It applies in favor of that party in either and in both situations. A party may move for a new trial and give the bond if a verdict has been rendered against him, because the statute says so. A party may do the same thing if a judgment has been rendered against him, because the statute says that too. Inasmuch as a verdict must precede a judgment,

the party against whom a judgment has been rendered must have been a party against whom a verdict was at one time rendered. That is to say, the party contemplated by both provisions of the statutes is the same party viewed at different and successive stages of the same litigation. It is not a provision for different parties who may, each in his own case, be differently circumstanced, but for the defeated party in every case, variously described with reference to the various situations through which he must pass to ultimate defeat. The liberty to move for new trial is given to this party at either of two stages of the litigation. The period of ten days is expressly defined as running from either. It necessarily follows, both that this privilege may be exercised in ten days from the verdict, because the statute says so; and that it may be exercised in ten days after the judgment, also because the statute says that same thing.

If the sense of the enactment is that the motion must be made and the bond filed in ten days after the verdict, and without regard whatever to the date of the judgment, there is no reason why the judgment should be mentioned at all. In that case it would be amply sufficient to say, simply, that the motion may be made, and the bond filed, within ten days from the date of the verdict.

The ruling of the Supreme Court upon this point seems to be in the very teeth of the statute, and it can be sustained only by eliminating half of the substance of the enactment with respect to the limitation of time.

Consideration of the evident purpose of the provision confirms the interpretation now contended for.

The whole provision leads up to the effect expressed in its concluding clause:

> "The filing of the bill of exceptions and bond shall operate as a stay of execution until the motion is determined."

The sole purpose of the statute is to provide a method by which the losing party may prevent the issue of execution and by which, at the same time, the prevailing party may be protected against increased costs and a fraudulent withdrawal of goods subject to execution.

The provision is obviously one for supersedeas and nothing else. It differs from the usual statutes to that end only in that it enables the losing party to supersede not only the judgment but the verdict; that is, the party, instead of being required to wait until judgment is entered against him, may enter a supersedeas on the verdict in anticipation of the judgment. If he files the prescribed bond after the verdict, either the judgment is not to be entered, or, if it is, execution is suspended.

The advantage to the losing party of thus anticipating a judgment by a supersedeas is obvious. A judgment is, usually, executionable at once; and if the defeated suitor is obliged to await the entry of judgment, he stands in danger of an execution issued immediately, or before he can procure and file a bond. To obviate this inconvenience, the statute affords a method by which he can at once, upon the rendition of an adverse verdict, prevent the entry of judgment or, at least, stay the issue of execution. To accomplish this result, he must give a bond to secure the

prevailing party against additional costs and against the fraudulent defeat of his prospective execution. All this, it will be perceived, differs in no wise from the ordinary supersedeas except in that it can be done before the entry of judgment.

Neither in all this, it is equally obvious, is there anything inconsistent with the usual common law supersedeas of the judgment by the giving of a bond after the entry of the judgment. It is expressly enacted that the motion for new trial may be made after the judgment is rendered; and the procedure evidenced in the present record shows that the local practice permits a motion for new trial to be made and entertained after the judgment as well as before. Both Judge Gear and Judge Lindsay considered and acted upon defendant's motion for new trial long after the judgment had been entered; and the Territorial Supreme Court finds in that fact nothing to criticize, but seems to treat it as in accordance with settled usage.

The statute, at any rate, expressly gives liberty to move for a new trial after, as well as before, the entry of judgment. And the same statute, with equal explicitness, makes it competent for the losing party to effect a supersedeas of the judgment in connection with his motion for new trial. If that party has, whether intentionally or inadvertently, failed to take advantage of the statute by giving a supersedeas bond before judgment and upon the verdict alone, he is still entitled, after the entry of judgment, to move for new trial and then to file the prescribed bond.

Upon no other construction, it is submitted, can effect be given to the two-fold provision of the statute, for a motion and a bond after verdict and for a

motion and a bond after judgment. And in no other way can the mention of both verdict and judgment be harmonized, or even accounted for. It must be understood that the losing party has an option, either to make his motion and to file his bond after verdict so as to forestall the judgment, or to await the entry of judgment and then to supersede by the motion and the bond.

In either case, such party has, by the very terms of the enactment, ten days in which to take advantage of this provision. He may supersede the verdict within ten days after its rendition, or he may supersede the judgment in a like period after the entry thereof.

Inasmuch as the bond in this case was given and approved on the very day that judgment was entered, the defendants were clearly within the statutory period and fully complied with the statute in the strictest interpretation thereof.

VIII

THE BOND WAS WAIVED BY THE PLAINTIFF

The defendants' motion for new trial was filed on the fourth day after verdict, or, excluding the intervening Sunday and holiday, on the second day. On the same day the motion was noticed for hearing on June 3d, which was the seventh calendar, and fifth secular, day after verdict. On June 3d, counsel for plaintiff requested an adjournment until the 7th, on the ground that he was not ready to argue the motion, and the matter went over to the day requested as a matter of courtesy to counsel. (p. 13.) On the 7th the objection to consideration of the motion, on the

ground that no bond had been filed, was raised for the first time. (pp. 13, 43.)

On June 3d, the day first set for argument of the motion, there was, upon any principle of computation and upon any possible construction of the statute, ample time for the defendants to file the statutory bond. Their promptness in procuring such a bond when the objection was afterwards raised warrants an inference that the same bond could and would have been given at once had the point been suggested on June 3d. It is fair to presume that this would have been done, and done in due season, if the hearing had been had on the day originally set therefor.

On June 7th, the day to which, at the request of counsel for the plaintiff, the hearing of the motion was adjourned, it was, upon the method of computation insisted upon by the plaintiff and approved by the Supreme Court of the Territory, too late to supply the bond. And although such a bond was actually filed on the same day that the objection was made, and within the space of the afternoon (p. 43), the Supreme Court held the whole proceeding void because the bond had not been furnished within ten days after the verdict.

Had the motion come on for hearing on June 3d, counsel for the plaintiff must either have raised this objection or have waived it by argument of the motion. If the point had not then been raised, the objection for want of a bond would, on elementary principles of estoppel and obvious considerations of fairness, have been deemed to be waived. If the supposed defect had been suggested, it would have been repaired, for which there was yet unquestionable opportunity.

Plaintiff's counsel, then, being under notice to argue the motion on the seventh day after verdict, when the objection if suggested would have been remedied, procured, as a pure matter of professional courtesy, an adjournment to the eleventh day after verdict when, according to his view of the law, it would be too late for his adversary to cure the defect then first suggested.

If counsel had done this thing intentionally to the end actually accomplished, it would have been in plain violation of common morality and professional ethics, and counsel would doubtless have incurred the well-merited reprobation of the court. A practitioner who would avail himself of the personal courtesy characteristic of a generous profession to put his adversary in such a position by reason of such an accommodation, could not, in any well regulated court, retain the fruits of such sharp practice.

It is, of course, not meant to intimate that the Deputy Attorney General, who represented the territory in this matter, procured the adjournment for the sake of effecting the result which followed upon that adjournment, and intending to lie by with his objection for want of a bond until he had carried the motion over the statutory period for giving the bond. But that was the effect of the delay which was allowed at his instance; and without reflecting upon that gentleman's motives of good faith, it is submitted that his procurement or the delay must be deemed a waiver of every objection which was made effective by that delay. The plaintiff, having caused the postponement of the motion, is estopped to take advantage of this point which became available solely by reason of that postponement.

This proposition is one, not only of elementary and obvious morality, but of well settled law.

The giving of this bond on a motion for new trial is a requirement purely in the interest of the prevailing party. As such, it may, of course, be waived by the party for whose sake it is instituted. This principle of common law and common reason is made a matter of positive enactment by the Hawaiian statutes, section 7 of the Revised Laws of the Territory providing:

> "But individuals may, in all cases in which it is not expressly or impliedly prohibited, renounce what the law has established in their favor when such renunciation does not affect the rights of others, and is not contrary to the public good."

This provision has been held applicable to a case where a party had by his conduct waived his right to have an appeal dismissed because of the appellant's failure to comply with statutory requirements:

> Estate of Kamakela, 12 Hawaii, 262.

The statutory requirement of a bond in judicial proceedings may be waived by the party for whose benefit the bond is prescribed, and will be deemed to be waived by any conduct indicating an intent or agreement to that result or amounting to an estoppel:

> Ives *vs.* Finch, 22 Conn., 101.
> Matlock *vs.* Pray, 61 Ill. App., 102.
> Brown *vs.* Tobias, 1 Allen, 385.
> Sherwood *vs.* Circuit Judge, 107 Michigan, 136.
> Cason *vs.* Landy, 82 Texas, 317.
> Long *vs.* Coal Co., 56 Mo. App., 605.

Defects in an appeal bond may be cured by mere lapse of time without action by the appellee:

Shank *vs.* Warfel, 14 Serg. & R., 205.
Battle *vs.* Woolf, 23 Miss., 318.

That the Attorney General's request for adjournment, without mention of the defect in the motion intended to be urged at the adjourned hearing, operated an estoppel, seems too clear to require or justify argument. By his silence on that point, he procured opposing counsel to consent to delay beyond the period when the point could be successfully avoided. Had the Attorney General suggested the objection, counsel for defendants would presumably have provided the bond, and would certainly not have permitted the hearing to go over beyond the date when the bond could be supplied if held to be necessary.

Under the circumstances, the omission of plaintiff's counsel to raise the point, and his thereby obtaining the delay requisite to make the point effective, was plainly a constructive fraud, which comes within the rule that, when silence becomes a fraud, it will operate as an estoppel:

Staton *vs.* Bryant, 55 Miss., 261.

The request for delay was also, and even more clearly, a waiver of the supposed defect in the motion, so far at least as that defect was one going to the jurisdiction of the court to entertain the motion.

The objection to the motion for new trial in this case was, or was insisted and adjudged to be, of a jurisdictional nature. It was not to a specific bond

for some defect therein, but to the authority of the court to entertain and hear the motion in the absence of any bond at all. Such objections to the jurisdiction of a court must be raised upon the party's first appearance before the court, and before he has done, or requested the court to do, anything else; otherwise the judisdictional point is waived, and the party, by invoking or submitting to the authority of the court in some other matter, accords jurisdiction to the court.

Here it appears that, pending the motion for new trial, the plaintiff, upon its first application to the court, suggested no objection to the jurisdiction, but sought from the court the favor of an adjournment. So the fact is found by the Territorial Supreme Court in its opinion holding that the supposed jurisdictional defect was not waived by such request for postponement. (p. 61.)

In thus holding upon that finding, it is submitted that the court erred. The rule appears to be universally accepted, and is certainly well established, that a motion for continuance or other delay is an admission of the court's jurisdiction.

An application for a continuance or adjournment of a cause amounts to a general appearance, and is a waiver of objections to process or notice:

Stockdale *vs.* Buckingham, 11 Iowa, 45.
Auspach *vs.* Ferguson, 71 Iowa, 144.
Bazzo *vs.* Wallace, 16 Nebraska, 290.
Lane *vs.* Leach, 44 Michigan, 163.
Murat *vs.* Hutchinson, 16 N. J. L., 46.
Wilkins *vs.* Wilkins, 4 Porter (Ala.), 245.
State *vs.* Messmore, 14 Wisconsin, 115.

So, of preliminary motions generally, as for change of venue, for security for costs, to strike papers from the files, to set aside as interlocutory order, and the like:

Tallman *vs.* McCarty, 11 Wisconsin, 401.
Shaffer *vs.* Trimble, 2 G. Greene, 464.
Raymond *vs.* Strine, 14 Nebraska, 236.
Malcolm *vs.* Marshall, 29 Ohio St., 611.

If the court had jurisdiction to entertain the motion for new trial without a bond on file, then the plaintiff's objection for want of a bond did not go to the jurisdiction, however well founded it may have been in point of law.

If the court was without jurisdiction to entertain the motion, then the plaintiff's proposal to adjourn the hearing to a later day was an admission that the court had jurisdiction to hear and act upon the motion.

The Attorney General could not contend that the court was powerless to hear the motion and at the same time ask that the hearing be had at a certain day. It was incumbent upon him, if he wished to contest the jurisdiction, to object to consideration of the motion when he was first called upon to answer to it. Instead of doing that, he first solicited time to prepare for the hearing, and in so doing he consented to a hearing and waived all objection to the jurisdiction of the court to consider the motion.

Under a statute requiring a bond to be given as a necessary element of an appeal, in a case in which the bond filed was defective, it was held that the appellee's acceptance of a stipulation according him

extra time for the filing of a brief was a waiver of the defect in the bond:

Safe and Lock Co. *vs.* People, 50 Ill. App., 336.

An appeal will not be dismissed on account of a defect in the bond when the objection is taken for the first time at the argument:

Parish *vs.* Eager, 15 Wisconsin, 532.

IX

THE ORDER OF NEW TRIAL WAS VALID

The absence of Judge Gear from the Territory was not considered by the Supreme Court of the Territory with reference to its bearing upon the validity of the order of a new trial, that court placing its decision upon the want of a bond.

It is, however, material to suggest that the order was valid notwithstanding that it came from the judge at a point without the territorial limits of the court's jurisdiction.

The motion for a new trial, having been made in due season and regularly adjourned from time to time (pp. 11, 12, 43, 44), came on for hearing on June 17, 1904. On that day it was taken under advisement by the court, with leave to the parties to file briefs in five days (p. 44), which period was extended by two or three successive orders subsequently made. (pp. 44, 45.)

By stipulation of June 24, it was agreed that the argument of the motion might be had, and the decision thereon rendered, in vacation. (p. 19.)

This stipulation effectually removed any objection, if such could otherwise be made, to the disposal of the motion outside of the court, and authorized the judge to act upon the matter at any time or place which might be convenient:

Matthias *vs.* Cook, 45 Pac. Rep., 56.

In Hawaii it is expressly held that, even without stipulation to that end, judicial action may be taken in vacation:

Herblay *vs.* Norris, 9 Hawaiian, 121.
Byrne *vs.* Allen, 10 Id., 327.

Even in the absence of such a stipulation, it seems well settled by the prevailing authority, and particularly by Federal authority, that it is competent for a judge to act upon such a motion in vacation and at chambers, or wherever else he may be, and that such orders as that of a new trial may be transmitted by the judge from a distance to the clerk, and may be by the latter entered as valid orders of the court.

Where Judge Gear was when he considered and decided the motion for new trial does not appear from anything in this record. Although the order of a new trial was cabled, and the written opinion was mailed from San Francisco, in February, the judge may have determined the matter and written the opinion before departing thence for California.

But, assuming that Judge Gear did not consider the motion or write the opinion until he arrived at San Francisco, he was then the judge of the Circuit Court, notwithstanding his absence from the juris-

diction, and he had power to act upon the motion and send his order by mail or telegraph for entry by the clerk.

United States *vs.* Finnell, 185 U. S., 236, was a case involving the right of the clerk of a court to compensation for entering orders sent to him by the judge through the mails. It is noteworthy that no doubt was suggested to, or entertained by, the court as to the validity of the orders so entered, or as to the propriety of the procedure. Incidentally, however, to the consideration of the clerk's right to be compensated for entries made in the absence of the judge, it was held that such acts constituted business actually transacted in court, it being said by Mr. Justice Harlan:

> "It is said that no business could be lawfully transacted 'in court' unless the judge was personally present. We do not assent to that view. It rests upon a construction which is too literal. The services for which Finnell's account was rendered constituted business actually transacted in court, unless it be that a clerk could never enter any order unless the judge was, at the time, in the place, room, or building where his court was ordinarily held. But we cannot so adjudge. There are many things that may be legally done by a clerk pursuant to the written order of a judge sent to him, and which, being done, may be fairly held to constitute business 'actually transacted in court.' This much is to be implied from sections 574 and 638, of the Revised Statutes, which are as follows [quoting the sections]:
>
> "As will be seen from those sections, the Dis-

trict and Circuit Courts of the United States are always open for transaction of certain kinds of business which, we think, may be transacted under the orders of the judge, who may at the time be absent from the place, room, or building in which the court is held."

A judge may act upon a motion for new trial while absent from the district in which the case is pending:

Chessman *vs.* Hart, 42 Fed. Rep., 98.

So other judicial acts incident to the trial of cases may be performed by a judge when without the county or other district wherein the cases are tried:

Oliver *vs.* Town, 24 Wisconsin, 512.
Chafee *vs.* Rainey, 21 South Carolina, 11.
R. R. Co. *vs.* Sloan, 31 Ohio St., 1.
Seely *vs.* Blair, 6 Ohio, 448.
Succession of Weigel, 17 Louisiana, Ann., 70.
Christie *vs.* Whitten, 69 Georgia, 765.
The Memphis, Fed. Cases, No. 9412.

A judge does not, for all purposes, cease to be a judge by going beyond the limits of the state:

Lynde *vs.* Winnebago Co., 16 Wall., 6.

Mr. Chief Justice Marshall, in disposing of the objection to an order, that it was not made in open court or at the place of holding court, said:

"No power, it is contended, is given to the judge, except when sitting as a court, and, there-

fore, the form of declaring himself to be a court is indispensable to the validity of his acts. This objection seems rather technical than substantial. By law, the district judge alone composes the court. He is a court wherever and whenever he pleases. No notice to parties is required. No previous order is necessary. It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business."

The Little Charles, 26 Fed. Cases, 982; 1 Brock., 380.

An order made, without any stipulation to that end, by a judge in vacation, and filed in the cause, is a valid exercise of judicial authority:

Butler *vs.* United States, 87 Fed. Rep., 655.
R. R. Co. *vs.* R. R. Co., 3 Indiana, 239.
Pressly *vs.* Lamb, 105 Indiana, 171.
Bowman *vs.* Rwy. Co., 102 Illinois, 459.
McClurg *vs.* McClurg, 53 Missouri, 173.
Gold *vs.* R. R. Co., 19 Vermont, 478.

So a judge is in the exercise of judicial functions when traveling to or from the place where court is held:

In re Neagle, 135 U. S., 1.

Nor does the delay beyond the judge's term of office in the arrival of the opinion affect the validity of the order made and entered within that term.

Judge Gear's commission as judge did not expire certainly, until March 2, 1905, and it may be construed as enduring until the 3d or 4th of that month (p. 109), if not, indeed, until the qualification of his successor, on March 20. (p. 50.) Until the 2d of March, Judge Gear was beyond question in office and empowered to make orders in all causes then pending in the Circuit Court.

The order of a new trial was received by cable on February 27, 1905, and was duly entered upon the minutes on the same day. (p. 45.)

It thereupon became an order of the court, and was valid without regard to the arrival of the opinion.

The order itself was the effective fact, and the opinion had nothing to do with the validity of the order. The order required no opinion to support or validate it. Such an order may be made without any opinion at all; and, in point of fact, such orders are usually made without accompanying written opinions, and often without the delivery of any opinion, whether oral or written. Many orders, and even final judgments, are entered by this and other courts without the filing of any written decisions, and sometimes without even any oral expression of the grounds of the court's action.

The opinion was merely explanatory of the order, an argument filed by the judge in support of the action taken by the order. The allowance of a new trial was effected by the cabled order, and the entry thereof upon the minutes, and it would have been equally effective if no opinion had ever been filed, or if no opinion had ever been written.

As the new trial was duly ordered within the judge's term of office, it is immaterial to its validity

that the statement of the grounds upon which the judge placed that action did not reach the clerk until the judge's commission had expired.

Where a decision is rendered by a judge before his retirement from office and is then transmitted to the clerk for filing, the decision is valid although it does not reach the clerk until after the expiration of the judge's term of office:

Babcock *vs.* Wolf, 70 Iowa, 676.

So of an order made by the judge and not actually entered until after his retirement from office:

Guthrie *vs.* Guthrie, 71 Iowa, 444.

X

ERROR IN REFUSING TO CONSIDER THE EXCEPTIONS

With respect to the defendants' bill of exceptions, the statement above made of the case will show that the refusal of the Supreme Court of the Territory to consider their exceptions was placed upon an extremely narrow ground of a highly technical character.

That court found as a fact, from the record and from supplementary evidence adduced, that the defendants had filed and actually placed in the hands of the trial judge, within the time allowed by the statute for that purpose, the draught of a bill of exceptions, which draught appears in the record. (p. 17.)

The Supreme Court also found and held that this draught sufficiently made the pleadings and divers other papers, including the transcript of the evidence, a part of itself by apt and adequate words of reference. (p. 129.)

But the court held that this transcript of the evidence, though thus made a part of the bill, did not incorporate into the bill the exceptions evidenced by that same transcript of the evidence. (p. 130.)

Thereupon, it was held that the time for perfecting the original bill of exceptions expired ten days after the decision of the trial court upon the motion for new trial, that is, on July 28, 1905, and that, after that date, the bill could not be amended, as it was amended, by the inclusion therein of the exceptions shown by the stenographic report of the trial. (p. 130.)

That the Supreme Court of Hawaii erred in thus holding the amendments to the bill of exceptions barred by lapse of time, will appear from several considerations.

1. The time for perfecting the bill of exceptions was extended by order of the court, entered on June 9, 1904 (p. 19), which granted the defendants ten days after the filing of the transcript of record to file "a further bill of exceptions."

When the "transcript of record," which obviously means the transcript of the testimony, and is so interpreted by the Supreme Court (p. 129), was filed does not appear, though it is clear that the stenographic report of the trial was before that court at the time of its final decision. (p. 143 *et seq.*)

All proper presumptions and intendments are, of course, to be made in favor of a bill of exceptions,

especially where, as in this case, it has been allowed by the trial court, and more especially where it has been so allowed after vigorous opposition and protracted consideration. The presumption, therefore, is that the trial court was satisfied, upon proof made before it, that the bill was filed within ten days after the transcript was filed.

2. By stipulation of counsel, approved by the trial court, of July 18, 1904 (p. 20), the defendants were allowed, for the purpose of filing their bill of exceptions, ten days "from and after the decision of the court on defendants' motion for a new trial."

The motion for new trial was granted on February 27, 1905, by Judge Gear, and was formally entered as granted by Judge Lindsay on July 18, 1905, just one year from the date of the stipulation. The order of new trial was reversed by the Supreme Court on April 14, 1906. (p. 79.) On the same day, the defendants applied for leave to amend the pending draught of their bill by incorporating therein the exceptions referred to (p. 80); and on the 17th, the trial court enlarged the time for completing the bill until the 27th, and afterwards until May 1st. (p. 99.) The amended bill was filed on April 30th, and signed by the court on May 3d, after long and thorough discussion. (pp. 97-99.)

The Supreme Court of the Territory held that the stipulation of July 18, 1904, limited the defendants' time for perfecting their bill to ten days after the ruling of the trial court upon the motion for new trial, and not to that period after the final decision upon that motion in the Supreme Court. (p. 130.)

The unreason of this construction is apparent when it is observed that the ruling of the trial court upon

the motion was in favor of the defendants. That ruling vacated the verdict and the judgment and left the defendants, for the time being, with nothing to do and nothing possible to be done. They could not, had they so desired, have prepared a bill of exceptions addressed to the reversal of a judgment which no longer existed; and had they presented such a bill, the court would have refused to consider it, and perhaps have censured them for attempting a vain and idle thing.

It was not until the judgment was revived and reinstated by the Supreme Court that there was any occasion or use for a bill, and the bill was then perfected within the time limited for that purpose.

It is inconceivable that the stipulation contemplated that the defendants should file their "further bill" in ten days after the trial court had ruled in their favor, upon peril of losing their exceptions in the event that the Supreme Court should, by some extraordinary stretch of power, reverse the order of new trial and reinstate the judgment. Upon all accepted principles, in the ordinary case, the action of the trial court granting a motion for new trial disposes of the judgment and dispenses with a bill of exceptions. These defendants could not, under any stipulation or otherwise, be bound to anticipate the improbable, and generally impossible, contingency that some appellate review might result in making it necessary to perfect their exceptions.

Such plainly was not the understanding of the trial court by which the stipulation was approved. And it is submitted that the Supreme Court erred in fixing the date intended by the stipulation, and in not holding that the defendants' time for amending

their bill ran from the date of the mandate reversing the order of new trial.

3. Independently of any stipulation or judicial extension of time, the period for perfecting the bill of exceptions commenced to run only from the final order overruling the motion for new trial, that is the date of the mandate of reversal by the Supreme Court.

In Hawaii, by section 1804 of the Revised Laws, *supra*, judgment may be entered at once upon the rendition of the verdict. Under such a practice, the matter of settling exceptions is regulated by different rules from those which obtain where the common law procedure is followed.

In those jurisdictions in which the custom prevails of entering judgment immediately upon the verdict, a motion for new trial, during its pendency, keeps the judgment open, and the time for filing exceptions does not begin to run until the judgment becomes final by the overruling of the motion:

Woods *vs.* Lindvall, 48 Fed. Rep., 73.
Rutherford *vs.* Ins. Co., 1 Fed. Rep., 456.
Brown *vs.* Evans, 8 Sawyer, 502.
Bank *vs.* Steinmitz, 65 Cal., 219.
Huze *vs.* R. R. Co., 71 Mo., 636.

A bill of exceptions need not be presented to the court while a motion for new trial is pending; and, if the motion goes over to a succeeding term, there is no occasion to prepare such a bill until final judgment is entered.

> "It would be useless labor for a party to prepare a bill of exceptions before the motion for

new trial had been passed upon, as it could not be known whether the bill would be needed until the final action of the court upon the motion."

People *vs.* Gary, 105 Ill., 264, 270.
Adrian etc., Co. *vs.* Lane, 92 Michigan, 295.

That a motion for new trial or rehearing suspends the finality of the judgment or decree, and the running of the time allowed for writ of error or appeal, is well settled:

Rwy. Co. *vs.* Murphy, 11 U. S., 488.
Brockett *vs.* Brockett, 2 How., 238.
Memphis *vs.* Brown, 94 U. S., 716.

After the order of the Circuit Court granting a new trial, the motion to that end was either pending or not pending. If it was not pending, there was no need or possibility of a bill of exceptions, because there was no judgment. If the motion continued pending, then the judgment did not become final until the decision of the Supreme Court overruling the motion. In the latter case, the time to complete a bill of exceptions did not commence until the motion was disposed of and the judgment became fixed.

4. The opinion of the Territorial Supreme Court turns upon a distinction so fine as to elude the apprehension of present counsel, or of any ordinary understanding.

The court holds (p. 129) that the wording of defendants' original bill was sufficient to incorporate therein, by reference, the extrinsic documents mentioned,

among which was the so-called "transcript of the record," which is understood to be the stenographic report of the testimony. It is also said that, "if the statement were not sufficient, it perhaps would be amendable so as to be made sufficient, as it is in the amended bill now before us."

On the next page, referring to the language of the original bill, the court says that it is not sufficient to incorporate into the bill the exceptions which appear in the stenographer's notes. The opinion, in the next sentence, proceeds to speak of the exceptions so evidenced as new exceptions which can not be introduced into the bill by amendment after the lapse of time allowed for settling the bill.

The original bill explicitly refers to the "pleadings, exhibits, and transcript of the record," and makes them "part of this bill of exceptions." (p. 17.) If, as the court holds, this is a sufficient incorporation of the stenographer's transcript, it is difficult to understand how the exceptions embodied in that transcript are so far foreign to the original bill as to be considered new exceptions when the transcript is actually copied in the record.

If, as the court seems to assume, matter contained in a document extrinsic to the bill may be adopted as part of the bill by mere reference, it is impossible, at least for counsel who write, to perceive how such matter ceases to be part of the bill when it is transcribed and actually written into the bill.

The court, it will be observed, does not hold that a bill of exceptions must be complete in itself, and in perfect form when first presented, nor is the first draught of this bill criticised as departing from the form accepted in local practice. On the contrary, it

is conceded that a bill may, in the first instance at least, supplement itself by reference to other papers, and that such a bill may be amended by rewriting it so as to embody in it the papers referred to.

Once establish that papers referred to in the bill can be thereby made a part thereof, and it becomes impossible to say that the matter thus adopted can afterwards become new matter. Whether such documents be actually worked into the skeleton of the bill by an actual rewriting, or made a part of it by merely tacking them to the original bill, in neither case can their contents be deemed additional matter to the original draught.

In this case, the defendants, in preparing their record for the Supreme Court, presented their exceptions by both of these methods. They rewrote their bill and set out the exceptions found in the transcript, and they attached to the bill that same transcript of the stenographer's notes to which the first draught of their bill referred, and which was expressly, and, it is held, sufficiently, made a part of the bill. The expanded bill is included in this record (p. 89), and the last opinion of the court shows unmistakably that the stenographic report was in the record there. (pp. 143 *et seq.*)

With respect to amendment, it will be further observed, the court does not hold that mere lapse of time precludes the amending of an imperfect bill by amplification of its original contents and the inclusion of matter originally stated or indicated by apt reference. The ruling is, not that the first draught could not be amended, but that the exceptions taken from the stenographer's notes were additional matter, and therefore not proper subjects for amendment.

It is submitted that it is impossible to reconcile the rejection of the exceptions embodied in the amended bill with the principles on the subject laid down by the court itself; and that, if it is permissible at all in the local practice to amend a bill of exceptions, this bill was properly amended by the transcription into it of the exceptions adopted by reference in the original bill.

5. The local practice, as prescribed by the local statutes, clearly admits of the amendment of bills of exceptions, and contemplates just such amendment as was allowed by the trial court in this case.

The statute law of Hawaii on this subject, so far as the same appears to bear at all upon the present question, is in the following sections of the Revised Laws:

> Sec. 1864. "A party may allege exceptions to any such opinion, direction, instruction, ruling or order, and the same being reduced to writing in a summary mode, and presented to the judge within ten days after the opinion, etc., objected to, and being found conformable to the truth, shall be allowed and signed by the judge, * * * provided, that further time may be allowed by the judge, in his discretion; and provided further, that if such exceptions are reported by a stenographer or entered in the judge's minutes, they need not be written out or signed by the judge within such time, but may be written out at the request of the party taking such exceptions, and allowed and signed by the judge, and filed with the clerk at any time, and any such exceptions, whether so reduced to writ-

ing in a summary mode, and allowed and signed by the judge, or so written out, whether allowed or signed by the judge or not, or filed with the clerk or not, may at any time within twenty days after final judgment, or such further time as may eballowed by the judge, be incorporated in a bill of exceptions and presented to the judge, and, being found conformable to the truth, shall be allowed and signed by him. * * *"

Sec. 1871: "A writ of error may be had to correct any error appearing on the record, either of law or fact, or for any cause which might be assigned as error at common law."

Sec. 1873: "For all purposes of sections 1869-1883, the record shall be deemed to include all pleadings, motions, notes or bills of exceptions, exhibits, clerk's or magistrate's notes of proceedings, and, if so desired by the plaintiff in error, a transcript of the evidence in the cause."

It will be remembered that, by section 1805, *supra*, the bill of exceptions must, if a stay of execution is desired, be filed, not in the twenty days after verdict allowed by section 1864, but in ten. Both provisions are unusually stringent, and this may account for the unusual latitude in respect of amendment which is so strikingly in the contemplation of section 1864.

This section obviously contemplates that the first draught of the bill shall be imperfect, or at any rate quite meager. The provision is that it shall be prepared "in a summary mode," by which is implied that it is not expected to be an elaborate or highly finished piece of composition. Indeed, the first draught is apparently intended by the statute itself

as a merely provisional bill filed to meet the contingency that the motion for a new trial may be overruled. And so it seems to be regarded in practice, it appearing that Mr. Hartwell, then counsel for defendants and now a justice of the Supreme Court, in filing the first draught of the bill, informed Judge Gear that he did so "to save all rights pending the defendants' motion for a new trial." (p. 88.)

Again, section 1864 contemplates that the first draught of the bill shall not contain any exceptions which are shown by the stenographer's notes. It is expressly provided that such exceptions need not be written out in connection with the original bill, but may be so written, if desired, "at any time."

Inasmuch as, by section 1871, the writ of error goes to error apparent in any part of the record, whether of law or of fact, and, by section 1873, the record includes, if the plaintiff in error says so, "a transcript of the evidence," and also the notes of the judge, no reason appears why the exceptions evidenced in these papers should ever be written out and formally embodied in the bill. Presumably, the judge's notes and the stenographer's will show all exceptions, and these are parts of the statutory record without any mention in the bill of exceptions.

Still further, the time for filing the bill, and of course for perfecting it, may be enlarged by the judge in his unlimited discretion to any period short of twenty days after the final judgment. This makes a latitude of amendment which depends solely upon the discretion of the trial court. If the judge sees fit to allow amendments a year or two after the original judgment, which is entered immediately after the verdict, there is no power of appellate review. Since

in this case, the trial court permitted the amendments, it is not perceived upon what theory the Supreme Court was empowered to overrule his statutory discretion.

Finally, section 1864 plainly contemplates the preparation of a second and complete bill of exceptions, to follow the bill first filed, and of which the original bill is to be only the skeleton and the first meager draught. The final draught of the bill is to be settled in twenty days after the final judgment, by which is understood the date when the original entry of judgment is confirmed by the denial of a new trial. Before this time, everything relating to the bill is *in fieri*. The judge may allow such time as he pleases for redraughting the original exceptions. The party may, without consulting the judge, transcribe his exceptions from the stenographer's notes and file them with the clerk, or may file the stenographer's transcript as a whole if he likes. In other words, whatever is done before the judgment is made final is simply the collection and preparation of the material out of which the real bill of exceptions is to be made.

Such being the nature of the proceedings as contemplated by the statute, it is manifest that any stringency in respect of amendment is not only out of place but actually in contravention of the statutory provision. The defeated party, while bound to file a provisional bill of exceptions, is not bound to include in it any exceptions which appear in the other papers which he is authorized to file and make a part of the record. So long as the motion for new trial is pending, he may take whatever time the court will allow to collect additional material for his bill; and it is not until the judgment becomes final that he must

seriously and diligently address himself to the moulding of his material into the final bill of exceptions.

It is not till then that the exceptions must be formally drawn out, and the evidence transcribed and embodied into the bill.

If the first draught is presented within the statutory period, the court may allow time for settling it:

Wideman *vs.* Ah In., 7 Haw., 262.

And even this requirement has been relaxed in recognition of a prevailing laxity in the practice:

Pearett *vs.* Kaaa, 7 Haw., 269.

Although the stenographer's notes should be incorporated into the bill: Dowsett *vs.* Maukealu, 10 Haw., 166; it seems that, in the summary bill, this may be done by reference:

Territory *vs.* Ah Moon, 14 Haw., 203.

The bill of exceptions submitted to the judge pending a motion for new trial need not embody the evidence. That is necessary only in case the motion is overruled and it becomes necessary to carry the case to the Supreme Court:

Kammalu *vs.* Lovell, 4 Hawaiian, 601.

In presenting a bill of exceptions to the trial judge, the evidence need not be set out:

> "The bill filed refers to the judge's minutes below and asks that they may be made a part of it.

> Upon these his decision was based, and though informal, we shall hold it enough in this case, but they must be copied and annexed to the bill."
>
> Ah Chu *vs.* Sung Kwong, 5 Hawaiian, 291.

This record shows that the defendants fully and accurately complied with all the requirements of these statutes. They filed a provisional bill on the first day after the judgment, which adopted by reference the transcript of the testimony and the exception therein noted. The Supreme Court of the Territory concedes, or seems to concede, that this was a sufficient designation of the exceptions, and that, if it was not, it was amendable. The defendants did not copy the evidence and the exceptions into their original draught, because the statute expressly dispenses with that until the final bill is to be settled. When it became necessary to settle the bill in final form, defendants filed the transcript of testimony and also expanded their first draught by drawing out their exceptions found in the transcript. The Supreme Court holds that, although this final draught was presented within the statutory allowance for such bill, it was too late to include therein the exceptions which had been sufficiently designated in the provisional bill.

This is a ruling that the exceptions evidenced by the stenographer's notes must be embodied in a settled bill within the period limited for the original draught. The statute expressly says that such exceptions "need not be written or signed by the judge within such time," but this may be done "at any time," and that the final bill, consisting of such notes, exceptions, and

other matters, "may, at any time within twenty days after final judgment," be presented to the judge and signed by him, as was done in this case.

The holding of the court is, therefore, in disregard of the rights secured to the defendants by the statute.

6. Independently of the local statute, and as a matter of general practice, the allowance of amendments to the original bill of exceptions was within the competency of the trial court. Inasmuch as that court, in the exercise of its discretion, permitted the first draught of the bill to be rewritten and allowed the amplified draught as a bill, the Supreme Court of the Territory was without authority to overrule the discretion of the Circuit Court.

The first draught was filed in court and delivered to the judge within the statutory limit, as the Supreme Court expressly finds. A motion for new trial being then pending, Judge Gear omitted to act upon this bill in one way or the other until his term of office expired, when he relinquished this bill, with the other archives of the court, to his successor. Judge Lindsay took no action upon the bill until the motion for new trial was determined by the Supreme Court. Then he proceeded to settle the bill, and in doing so caused it to be rewritten into the final form, in which form he signed it, *nunc pro tunc* as of April Term, 1904. (p. 93.)

A bill of exceptions must be presented to the court by the exceptant within the trial term, or the judgment term, according to the rule or statute governing, or within some extension of the term granted for that purpose. Delay beyond the term to submit the bill is the act of the party, and precludes him either

to file a bill or to amend in substance a bill filed in due season:

Coughlin *vs.* C. C., 106 U. S., 7.
Bank *vs.* Eldred, 143 U. S., 293.

But the power of the court to extend the time for presenting and settling the bill is beyond question, and the extension need not be for any limited period but may be indefinite:

Hume *vs.* Bowie, 148 U. S., 245.

In Ward *vs.* Cochran, 150 U. S., 597, a motion for new trial was held under advisement for nearly a year after the verdict. Upon the entry of judgment, the court extended the term until the first day of February following for the purpose of settling exceptions. The plaintiff in error filed the draught of a bill in January, whereupon the court allowed an additional month to permit the defendant in error to suggest amendments to this bill, and on March 1st signed the bill. And the bill thus settled was held valid.

In this case, it is immaterial whether or not the formal orders of the trial judge regularly and sufficiently extended the term or the time for the final settlement of the bill. Since the defendants in that court had submitted their bill in due season the delay thereafter was the delay of the court, and by this the exceptants could not be prejudiced:

Davis *vs.* Patrick, 122 U. S., 138.
United States *vs.* Breitling, 20 How., 252.

Where a party presents his bill of exceptions to the judge within the time prescribed, he can not be prejudiced by the failure of the judge to act upon it within the period limited for that purpose:

Underwood *vs.* Hosack, 40 Illinois, 98.
Field *vs.* Gellerson, 80 Maine, 270.
Browne *vs.* Hale, 127 Mass., 158.
Cochrane *vs.* Little, 71 Md., 323.
Ferris *vs.* Bank, 158 Ill., 237.
Talty *vs.* D. C., 20 App. D. C., 489.

The judge may take his own time to consider the bill submitted to him, and delay on his part beyond the term or its extension will not deprive the excepting party of the benefit of his bill:

Johnson, etc., Co. *vs.* Wright, 28 App. D. C., 375.

A *nunc pro tunc* order is always admissible when the delay has arisen from the act of the court:

Gray *vs.* Brignardello, 1 Wall., 627.

Any other rule would be manifestly unjust to the party, and sometimes so to the court, and would often result in grave miscarriage of justice. The judge may naturally desire to give extended consideration to the bill, or may be obliged by press of more urgent duty to postpone it, or may fall ill and remain so for months, or may go abroad upon a long absence. It is plain that such circumstances should not defeat whatever rights the excepting party may have

acquired by the timely submission of his proposed bill, nor is it understood that those rights must fail unless the court enters express orders from time to time reserving itself the power of further consideration and final settlement of the bill.

The power of the trial court, within this period of consideration, to permit, or to direct, or to make amendments to the bill as originally presented, seems equally indisputable. The court is, of course, not bound to sign whatever bill the exceptant sees fit to submit. Neither is the court bound to reject the exceptant's draught because it seems insufficient, incorrect, or erroneous in some other respect. The bill, when finally settled, is the act of the court, and the court may insist that the bill shall conform to the judge's recollection and judgment. The court may, itself, if it likes, draw the bill in its final form and sign it. The court may, therefore, require or permit the exceptant to make such alterations in the original draught as are necessary to convert that draught into such a bill as the court will sign.

So long as the court retains authority to sign any bill at all, it retains the power to control the form and contents of the bill to be signed. This implies power to direct or to allow the exceptant to redraw, amplify, correct and add to the original draught.

The decision of the Territorial Supreme Court on this point (p. 128) proceeds upon the assumed principle that the exceptant must abide by his bill as it stands when the statutory period for filing a bill expires, and that, after that period, the court is powerless to allow even an expansion of the first draught, but must either sign or reject the bill as it then stands.

It has been shown that the Hawaiian statutes do not impose any such exceptional stringency; and it is clear that the generally accepted principles of practice do not. In many jurisdictions, as is well known, it is the accepted practice to present in the first instance what are known as skeleton bills of exceptions, which serve to save the rights of the exceptants, and which are filled in and amplified to make the final formal bill within such subsequent time as may accord with the discretion or the convenience of the court. In those jurisdictions in which a stricter practice prevails, the first draught of the bill is required to be more or less complete, but is subject to revision, addition, retrenchment or other correction according to the discretion of the trial judge. What shall constitute a sufficient bill to be filed within the time limited and to save the exceptant's rights, and to what extent the first draught shall be amplified, altered and rewritten, are matters quite generally, if not universally, left to the trial court to determine. And, so long as the power remains in that court to settle any bill at all, there must remain also the power to dictate what shall be the form and contents of the bill which it will settle.

In this case, therefore, Judge Gear was not bound to sign or refuse to sign the original bill at once upon its presentation, nor was Judge Lindsay bound to act upon it in either way immediately upon his accession to the bench. Either or both of these judges was entitled, in the absence of some restrictive statute, to retain the bill for consideration. And either had power to prescribe what should go into the completed bill. Judge Lindsay authorized the settlement of the

bill in the final form in which it appears in the record. Inasmuch as the exceptants had presented a bill within the prescribed season for presentation, they could not be prejudiced by the protracted delay of the court in acting upon it. And, since the bill as finally settled by Judge Lindsay was such a bill as he had authority to prescribe, or himself to write, it was beyond the power of the appellate court to hold it an unauthorized bill.

For these reasons it is submitted that the Territorial Supreme Court erred in refusing to consider the exceptions set out in the final bill of exceptions.

XI

CONCLUSION

1. Since the Supreme Court of the Territory erred in refusing to consider the exceptions presented by the now plaintiffs in error, those plaintiffs would, in any event be entitled to have the final judgment reversed and the cause remanded for proper adjudication upon their bill of exceptions.

Where a trial court, upon a motion for new trial, erroneously refused to read affidavits offered in support of the motion and denied the new trial, it was held that the judgment should be for that reason reversed and the trial court required to pass upon the motion in the light of the affidavits:

Mattox *vs.* United States, 146 U. S., 140.

So where the trial court denied a new trial upon an erroneous understanding of its power and duty in such matters:

R. R. Co. *vs.* Moore, 121 U. S., 358.

2. Inasmuch, however, as the Territorial Supreme Court, erroneously and in excess of its jurisdiction, assumed to vacate a valid order of new trial, its judgment to that effect should also be reversed.

The result is that both judgments should be reversed, leaving the case to stand upon Judge Gear's order of a new trial.

It is accordingly submitted that the final judgment should be reversed and the case remanded to the Supreme Court of the Territory with instruction to reverse its judgment vacating the order of new trial, and to remand the cause to the Circuit Court for a new trial.

WILLIAM R. MATTHEWS,
CHARLES A. KEIGWIN,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 7.

E. J. COTTON, C. E. COTTON and JAMES H. AGASSIZ, Copartners, doing business under the firm name of COTTON BROTHERS & COMPANY,

Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,

Defendant in Error.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES R. HEMENWAY,
Attorney General of Hawaii,
for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 7.

E. J. COTTON, C. E. COTTON and JAMES B. AGASSIZ, Copartners, doing business under the firm name of COTTON BROTHERS & COMPANY,
Plaintiffs in Error,
vs.
THE TERRITORY OF HAWAII, by C. S. HOLLOWAY, Superintendent of Public Works,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This suit was brought by the Territory against plaintiffs in error named above to recover damages in the sum of $25,000.00 for the loss of a dredger through their alleged negligence. The matter came on for trial in May, 1904, before the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, and on May 27, 1904, a verdict was rendered awarding damages in the sum of $25,000.00. (Tr. p. 11.) Defendants moved for a new trial on May 31, 1904, giving notice that the motion

would be presented for argument on June 3, paying accrued costs of court and a deposit for costs of the motion, but filing no bond conditioned that they would not, to the detriment of the plaintiff, remove or otherwise dispose of property liable to execution on the judgment. (Tr. pp. 12-13.) The Territory of Hawaii moved to dismiss the motion for a new trial on the ground that statutory requirements had not been complied with, and after argument on this motion a formal written judgment was entered and a bond filed. (Tr. pp. 15-16.) Defendants also filed on June 8, 1904, a proposed bill of exceptions, which, however, was never allowed. (Tr. p. 17.) Thereafter the motion for a new trial was considered, and on February 27, 1905, the Clerk received and filed a cablegram, dated San Francisco, California, purporting to be signed by Gear, Judge (Gear being the judge who presided at the trial and to whom the motion for a new trial was submitted), reading as follows:

> "In Territory vs. Cotton order motion for new trial granted. Grounds mailed."

(Tr. p. 21.) The Clerk also received and filed on March 4, 1905, an opinion signed by Gear, Judge, ordering a new trial. (Tr. pp. 22-32.) The term of Judge Gear expired at midnight, March 2, 1905. On April 14, 1905, defendants moved the Court, Judge Lindsay, who was Judge Gear's successor, sitting, that a formal order be entered granting a new trial, which motion was granted July 18, 1905, and a formal order to that effect was entered the next day, the Territory excepting to such order. (Tr. pp. 32, 33 and 34.) On January 17, 1906, the Territory sued out a writ of error from the Supreme Court of Hawaii, based upon various assignments, chief of which was that the trial court erred in granting defendants' motion for a new trial. (Tr. p. 52.) Defendants, plaintiffs in error here, thereupon moved to quash the writ of error, claiming that the order granting a new trial was not reviewable on error and that

the Territory had waived its right to a review of such ruling. (Tr. p. 59.) On March 8, 1906, the Supreme Court of the Territory, after full argument and consideration, denied the motion to quash the writ of error. (Tr. pp. 60-70.) Thereafter, on March 23, 1906, the questions raised by the writ of error were presented to the Supreme Court of Hawaii, which, on April 9, 1906, rendered its decision reversing the order of the Circuit Court, which granted a new trial. (Tr. pp. 72-79.) Defendants then presented to the Circuit Court a motion asking that the bill of exceptions filed on June 8, 1904, might be amended in various particulars. (Tr. p. 80.) The Territory strongly opposed the granting of this motion, but on April 28, 1906, the motion was granted and the bill as amended allowed. (Tr. pp. 80-123.) The Territory then moved in the Supreme Court of Hawaii to dismiss this amended bill of exceptions. This motion was decided by said Supreme Court on July 10, 1906, the Court holding that only the exception specifically set out in the original bill filed on June 8, 1904, (Tr. p. 17) could be considered, but that inasmuch as the amended bill contained this exception the motion to dismiss must be denied, and it was so ordered (Tr. pp. 128-130). This exception was to the effect that the verdict was contrary to the law and to the evidence. In this condition therefore the case went again to the Supreme Court of the Territory, and said Court, in an elaborate opinion, overruled the exception, thereby sustaining the judgment theretofore entered. Plaintiffs in error then petitioned for a writ of error from the Supreme Court of the United States, which petition was allowed on October 4, 1906, by the Chief Justice of the Supreme Court of the Territory of Hawaii. (Tr. pp. 159-161.) Various assignments of error were set forth (Tr. pp. 163-168) which, however, were later abandoned, and on February 14, 1907, a new assignment of errors was filed. (Tr. pp. 176-177.)

This assignment seems to be designed to present two main questions for review:—first, the action of the Supreme Court of Hawaii in regard to the motion for a new trial, (Assignments 1, 5 and 6), and second, the action of said Court upon the bill of exceptions presented by defendants, plaintiffs in error here, (Assignments 2, 3 and 4). These questions will be considered in this order, and it will be shown that in no view of the case was error committed by the Supreme Court of Hawaii.

ARGUMENT.

I.

UPON THIS WRIT OF ERROR THIS COURT CANNOT REVIEW THE ACTION OF THE SUPREME COURT OF HAWAII, EITHER WITH REGARD TO THE BILL OF EXCEPTIONS, OR WITH REGARD TO THE MOTION FOR A NEW TRIAL.

By Section 86 of the Act to Provide a Government for the Territory of Hawaii, approved April 30, 1900, (31 Stat. at Large, 141), as amended by Section 3 of the Act approved March 3, 1905, (33 Stat. at Large, 1035), appellate proceedings as between the courts of Hawaii and the courts of the United States are governed by the same rules which govern such proceedings as between the courts of a State and courts of the United States, with the proviso that writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of $5,000.00. By Section 709 of the Revised Statutes the only judgment or decree which can be so re-examined and reviewed by the Supreme Court of the United States is the final judgment or decree in the highest court of the State in which a decision could be had. The writ of error in

this case runs to the final decision rendered by the Supreme Court of Hawaii on September 27, 1906. (Tr. p. 160.) Such decision was the decision overruling the exceptions brought to the Supreme Court of Hawaii. (Tr. p. 159.)

It is submitted that this decision of the Supreme Court of Hawaii is not a final judgment within the meaning of Section 709 of the Revised Statutes or on general principles. After considering the exceptions brought before it by defendants' bill, the Supreme Court on September 27, 1906, filed its opinion, which concludes as follows: "The exceptions are overruled." (Tr. p. 155.) On the same day, the Clerk of the Supreme Court made the following entry upon the minutes of the Court: "The exceptions are overruled." (Tr. p. 159.) An examination of the record shows that these exceptions were taken to certain rulings occurring in the trial before the Circuit Court. Judgment in the case had already been entered, (Tr. pp. 13 and 15), under date of May 27, 1904, and following the verdict of the jury.

Upon a bill of exceptions only certain specific rulings are made the direct subject of review and only so much of the record comes before the appellate court as is necessary to pass upon such rulings. The decision is usually that the exceptions be sustained or overruled, and that such further proceedings be had as this ruling may require. It is obvious, then, that the decision of the Supreme Court of Hawaii upon a bill of exceptions cannot be a final judgment in the sense that such judgment is the final act determining the rights and liabilities of the parties. It is obvious that if, in the opinion of the Supreme Court of Hawaii certain exceptions to rulings made by the lower court were well taken, its decision would necessarily be that such exceptions be sustained, and either that a new trial be had, or that such further proceedings be had as such ruling might require. It would not be seriously contended in such a case

that the decision of the Supreme Court was a final judgment, nor is there any more reason for considering it to be a final judgment in the present case where the exceptions were overruled. The overruling of the exceptions in this case necessarily left the record in the condition in which it was prior to the allowance of the bill. Therefore, the judgment formally entered in the Circuit Court stood and stands as the final adjudication of the questions at issue between the parties.

The Territory now submits that only this judgment, to wit, the judgment entered in the Circuit Court, can properly be made the subject of a writ of error from this court, and that by the writ now before the court the questions adjudicated below are not presented for review.

The practice in Hawaii as to exceptions is similar to that in Massachusetts and the other States where bills of exceptions bring up to the appellate court for review certain specific rulings only, and do not bring up the entire case including the final judgment rendered. In such States writs of error from this court have run to the court where the final judgment was entered.

Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265;

Worts v. Hoagland, 105 U. S. 702, 26 L. ed. 1109;

Polleys v. Black River Improvement Co., 113 U. S. 83, 28 L. ed. 938;

Stanley v. Schwalby, 162 U. S. 269; 40 L. ed. 960, at 965;

McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542;

Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573.

It is the settled rule that a judgment to be final within the meaning of the acts of Congress giving this court jurisdiction on writs of error over such judgments, must terminate the litigation between the parties on the merits of the case so that if this

court affirms such judgment, the court below would have nothing to do but to carry it into effect.

Bostwick v. Brinkerhof, 106 U. S. 3, 27 L. ed. 73;
McFarland v. Brown, 187 U. S. 237, 47 L. ed. 158.

It is therefore submitted that the decisions of the Supreme Court of Hawaii based upon bills of exceptions brought before such court cannot properly be made the subject of writs of error from this court.

However, if it be considered that this court can review such a decision of the Supreme Court because it is to be considered as final within the meaning of the acts of Congress to which reference has been made, then it is submitted that upon the writ now before the court, the decision of the Hawaiian Supreme Court with regard to the motion for a new trial cannot be reviewed.

The writ of error now before this court was obtained to review the decision of the Territorial Supreme Court rendered September 27, 1906, overruling the bill of exceptions brought by defendants, (plaintiffs in error here). (Tr. pp. 159, 160 and 168.) The bill of exceptions did not include any exception relative to the matter of a new trial. The final action, therefore, of the Territorial Supreme Court, which is now presented for review, does not include its previous action with regard to the order of new trial. Only such errors as are properly shown by the record can be reviewed by this court upon a writ of error, and the "record" in this case is only that portion of the printed transcript material to the questions raised and passed on by the Territorial Supreme Court in giving its decision upon the bill of exceptions.

Since by this writ, only the judgment on the bill of exceptions is subject to review, it is difficult to see on what theory plaintiffs in error now seek to secure a reversal of the order of the Supreme Court of Hawaii with regard to the order of new trial. Such

order was either final or interlocutory. If it is a final judgment, then it must be made the subject of appellate review by some direct method employed for that purpose. There cannot be two final judgments in one case, nor can a single writ of error be used as a means of securing a review of two final judgments. On the other hand, if this order is not to be considered as final, but as interlocutory, then in prosecuting their bill of exceptions without having included a proper exception to an order denying the new trial, which order possibly could have been secured from the trial court after the decision of the Supreme Court had been rendered, plaintiffs in error must be considered to have abandoned this issue and they must now stand on the questions raised by their bill.

This court is not concerned with what plaintiffs in error might have done. Nor is it necessary now to consider what method they should have adopted in order to bring before this court for review the order of the Supreme Court of Hawaii reversing the order granting the new trial. It is submitted that by reason of the action taken by defendants themselves (plaintiffs in error here), they are now precluded from securing a review of the action of the Territorial Supreme Court relative to the order of new trial.

However, if it should be considered that in this proceeding the decision of the Territorial Supreme Court upon the matter of the new trial is open for review, then it is submitted that no error exists with regard thereto, but that such decision was correct.

II.

THE ORDER OF NEW TRIAL WAS PROPERLY HELD TO BE REVIEWABLE ON WRIT OF ERROR BY THE HAWAIIAN SUPREME COURT.

The motion for a new trial was filed on May 31, 1904, and noticed for argument on June 3, 1904. Accrued costs were paid and a deposit made for the costs of the motion, but no bond was filed conditioned that defendants would not, to the detriment of plaintiff, remove or otherwise dispose of any property they might have liable to execution on the judgment, as required by Sec. 1805 of the Revised Laws of Hawaii. On June 3, plaintiffs' counsel not appearing, a postponement of the hearing of the motion was ordered until June 7. The only showing in the record as to what was actually done by plaintiff's counsel on June 3 is made by an affidavit filed by defendants' counsel in support of a motion to extend time for perfecting the motion for a new trial. (Tr. p. 13.) On June 7, the motion was argued and objection was made by the Territory on the ground that the statutory bond had not been filed. Defendants' counsel orally asked for twenty-four hours' time in which to file the bond after entry of judgment (Tr. p. 43) and on the same day filed a motion asking that the time for perfecting their motion for a new trial by filing the bond required by statute be extended forty-eight hours from date. (Tr. p. 12.) Although the court had taken the matter of the dismissal of the motion for a new trial under advisement until 1:30 P. M., on June 7, upon the presentation at 12 M. on said day of defendants' motion to extend time for filing the bond, the court ordered the clerk to enter up judgment in favor of plaintiff and against defendants, stating that the court was of the opinion "that the bond required by statute relating to such judgment could not be filed until the judgment was entered," and therefore defendants' motion for

time to file a bond was granted. (Tr. p. 43.) It appears that two formal judgments were entered on the record, one on June 7, signed by Sims, Clerk, and entered as of the April Term, 1904, (Tr. pp. 13 and 14); and another on June 8 signed by Smith, Clerk, and entered as of the 27 day of May, 1904, (Tr. p. 15). The statutory bond was presented and approved on June 7 and filed the next day, and on June 7 notice was given by defendants that the motion for a new trial would be presented on the 14th day of June. A continuance was had from the 14th to the 17th, when plaintiff renewed its objection to the hearing of the motion on the ground that the statutory requirements had not been complied with, which objection, however, was overruled and argument was had upon the motion itself. Before deciding the motion, Judge Gear, before whom the matter had been presented, went to California. On February 27, 1906, more than nine months after the motion had been argued and submitted, the Clerk received and filed a cablegram (Tr. p. 21), dated San Francisco, California, February 27, 1905, and reading as follows:

> "In Territory v. Cotton order motion for new trial granted. Grounds mailed. Gear Judge."

On March 4, 1905, the clerk received by mail and filed an opinion signed by Gear, Judge, concluding as follows:

> "It seems to me that the court erred in failing and refusing to instruct the jury to return a verdict for the defendants, and for this reason a new trial should be ordered." (Tr. p. 32.)

The clerk also received a letter dated at San Francisco, California, February 25, 1905, signed by George D. Gear and stating that sickness had kept him at San Francisco; that two memoranda were sent with the letter for filing and that the writer hoped they would get "there" in time (Tr. p. 21), one of the memoranda presumably being the opinion just mentioned.

Judge Gear was appointed a territorial circuit judge on March 2, 1901, for a term of four years, which term therefore expired at midnight on March 2, 1905, if indeed it did not expire at midnight the preceding day. On April 14, 1905, only three days less than ten months after the motion for a new trial had been submitted, defendants (plaintiffs in error here), moved the court, Judge Lindsay, who was Judge Gear's successor, sitting, that a formal order be entered granting defendants' motion for a new trial, basing such motion upon the record including the decision of Judge Gear above referred to (Tr. p. 32). This motion was granted on July 18, 1905, thirteen months after the motion for a new trial had been argued and submitted. On January 17, 1906, the Territory sued out a writ of error to reverse Judge Lindsay's order. The Supreme Court of Hawaii first denied a motion to quash the writ of error so sued out and then, after consideration of the writ upon its merits, reversed the order made by Judge Lindsay. Error is alleged to have been committed both in the overruling of the motion to quash and in the decision reversing the order of the court below.

The facts stated above have been given at length in order that it may appear clearly just what facts are involved in a consideration of this phase of the case.

In order to show error it would be necessary for defendants (plaintiffs in error here), to show either that the Supreme Court of Hawaii had no jurisdiction to pass upon the matter of the new trial or that its conclusion with regard to this motion was erroneous.

It is without question the rule both as a matter of general law and of local practice in Hawaii that an order granting or denying a motion for a new trial is not ordinarily subject to appellate review by means of a writ of error brought up immediately. This view was strongly urged by defendants' attorneys before the Territorial Supreme Court and declared by the

court to be applicable in Hawaii in its opinion overruling the motion to quash the writ of error (Tr. pp. 62 and 63). But it is equally well established by authority that when an order granting or denying a motion for a new trial is made without power it is to be regarded as a new proceeding and therefore reviewable by an appellate court.

Phillips v. Negley, 117 U. S. 665; 29 L. ed. 1013;
Hume v. Bowie, 148 U. S. 245; 37 L. ed. 438;
McFarland v. Brown, 187 U. S. 239 at 244; 47 L. ed. 161;
Deering v. Creighton, 26 Ore. 556;
Killip, Admr., v. Empire Mill Co., 2 Nev. 34 at 42;
Stewart v. Ewbank, 3 Iowa, 191;
Tubman v. P. O. R. R., 190 U. S. 38; 47 L. ed. 946;
Manning v. German Insurance Co., 107 Fed. 52;
Coughlin v. D. C., 106 U. S. 7; 27 L. ed. 74;
Boyd v. Munro, 32 S. C., 249, 10 S. E., 963;
Magill v. Lyman, 6 Conn. 59, 68;
Mallox v. U. S., 146 U. S. 140; 36 L. ed. 917, 920.

Adopting this view the Territorial Court held the order granting a new trial to be reviewable because the trial court had no power to make it. Accordingly the motion to quash was denied, (Tr. pp. 64 and 70) and the question considered on its merits with the result that the order granting a new trial was reversed. (Tr. p. 79.)

III.

THERE WAS NO ERROR IN REVERSING THE ORDER GRANTING A NEW TRIAL.

If the order made in this case granting a new trial is an order of this character, that is, if it was beyond the power of the trial court to make the order, then, as has been pointed out, it

was properly subject to review by the Territorial Supreme Court. The Territory submits that the order was beyond the power of the trial court for several reasons.

A. *The construction of Sec. 1805 R. L. has been settled by the Courts of Hawaii.*

Whatever ambiguity there may appear to be in the wording of Section 1805 R. L., it must now be considered as settled that the section clearly intends that the bond must be filed within ten days after the rendition of the verdict in any civil jury case if a party desires to move for a new trial. This rule has become established by the practice in Hawaii as shown by the decisions of the Supreme Court.

Joliva v. Kaulukou, 7 Haw. 731;
Napahoa v. Chinese Union, 7 Haw. 379;
Gonsalves v. Brito, 8 Haw. 254;
Ferreira v. H. R. T. & L. Co., 16 Haw. 797;
Briggs v. Mills, 4 Haw. 450;
Harrison v. Magoon, 16 Haw. 170, 179.

In the case last cited, it is of interest to note that Justice Hartwell, who was defendants' attorney in the trial of this present case and made on their behalf the motion for a new trial, and who later became a member of the Supreme Court, says in the concurring opinion filed by him that a "prerequisite" of a motion for a new trial made under the authority of Sec. 1805 of the Revised Laws, is the filing of the statutory bond.

This being the established practice in Hawaii and it appearing that the bond upon the motion for a new trial in this case was not filed until June 8, 1904, twelve days after the rendition of the verdict, and the rendition and entry of the formal judgment, it is clear that defendants in error failed to comply with the provisions of the statute as construed.

B. This Court will not review rulings of the Territorial Supreme Court construing local Statutes.

It is submitted by the Territory that this court will not review the rulings of the local Supreme Court construing local statutes not in conflict with the statutes of the United States. No contention can be made that Sec. 1805 of the Revised Laws is in any way in conflict with any provision of the statute law of the United States. It is, as appears upon its face, purely a local statute designed to provide for a matter of local practice. It therefore falls within the rule above stated, which is laid down by many decisions of this court.

Wilson v. Standefer, 184 U. S. 399 at 412; 46 L. ed 618;

Elmendorf v. Taylor, 10 Wheat. 153 at 159, 6 L. ed. 289;

Sioux City R. R. Co. v. Trust Co., 173 U. S. 99 at 107, 43 L. ed. 628;

Green v. Lessee of Neal, 6 Pet. 291, 297, 8 L. ed. 403;

Smith v. Jennings, 206 U. S. 276, 51 L. ed. 1061;

Haire v. Rice, 204 U. S. 291; 51 L. ed. 491 at 495;

U. S. Savings, etc., Co. v. Harris, 113 Fed. 27 at 36;

Nobles v. Georgia, 168 U. S. 405; 42 L. ed. 518;

Hibben v. Smith, 191 U. S. 310; 48 L. ed. 195;

Iroquois Transportation Co. v. DeLaney, etc., Co., 205 U. S. 354, 51 L. ed. 836;

Stone v. Southern Ill. & M. Bridge Co., 206 U. S. 267; 51 L. ed. 1057;

O'Connor v. Texas, 202 U. S. 501, 50 L. ed. 1120;

West v. Louisiana, 194 U. S. 258, 48 L. ed. 965;

Brown v. N. J., 175 U. S. 172, 44 L. ed. 119;

Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 1023;

Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487;

San Francisco v. Scott, 111 U. S. 768, 28 L. ed. 593;

Cal. Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206;

Supreme Lodge K. of P. v. Meyer, 198 U. S. 508, 49 L. ed. 1146.

C. Defendants did not file the bond within the ten days prescribed by statute.

Section 1805 of the Revised Laws as it stood at the time of the motion for a new trial read:

> "Any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after rendition of verdict or judgment, for a new trial, for any cause for which by law a new trial may and ought to be granted. The filing of the bill of exceptions and bond shall operate as a stay of execution, until the motion is determined."

The preceding section required that:

> "Judgment shall be entered by the Clerk without motion immediately upon the rendition of a verdict or of a judgment of the court or of a judge at chambers and execution may issue thereon at any time thereafter when called for unless notice is given at the time of rendering the verdict or judgment of a motion for a new trial and the filing of a bill of exceptions and bond as provided by statute within ten days after the rendition of such verdict or judgment."

While it is true that the language of the sections quoted may seem obscure, yet a careful study of the sections in the light of the construction given by the courts of Hawaii will show clearly the purpose and intent of the statute.

The doubt arises over the construction of the word "judgment" in Sec. 1805. One possible construction is that the word "judgment" is used in the broad sense, since the words "verdict or judgment" first used in this section refer directly to the verdict or judgment "as set forth in the last preceding section" and in this preceding section the word "judgment" is used in the sense of a judgment rendered by a court without a jury, as for instance in a jury waived case and not in the sense of a judgment entered upon a verdict. This view is strengthened by the use of the words "such judgment" in Section 1805 referring clearly to the prior words "verdict or judgment."

It will also be noted that in both sections the verdict and the judgment referred to are those which are rendered and not those which are entered. It is therefore possible to consider that the word "judgment" is used in the sense of a judgment rendered as different from a judgment entered upon a verdict, referring to the judgment which in contemplation of law is rendered, and which is usually the only judgment rendered upon a verdict in Hawaii, as ordinarily a formal judgment is not rendered after a verdict.

Opinion of Frear, C.J., Tr. p. 65;

See also:

Lanier v. Richardson, 72 Ala. 134;
Stahl v. Golzenbarger, 45 Wis. 121;
Lynch v. Rome Gas Co., 42 Barb. (N. Y.) 591.

But if the word "judgment" is intended to refer to the judgment entered as distinguished from that rendered in contemplation of law, then it may properly be considered as referring to the judgment entered in contemplation of the law by the clerk

immediately upon the rendition of a verdict as required by Section 1804, which judgment the law will presume to have been entered.

Rose v. Smith, 5 Haw. 377, at 380;
Kalelialii v. Grinbaum & Co., 9 Haw. 213, at 215;
Kukea v. Keahi, 10 Haw. 505, 506.

Even if the word "judgment" should be construed to refer to a formal judgment entered, defendants are not in any better position, since as matters of fact it appears from the record (Tr. pp. 13 and 15), that the two entries of judgment, made by Sims and Smith on June 7 and 8 respectively, were made as of the date of the verdict. These entries are clearly ministerial acts, both in form and substance, evidencing a judgment already rendered. Therefore, the judgment entered as distinguished from the judgment rendered stands on the record under the date of May 27, 1904.

Freeman on Judgments, (3rd Ed.) Sec. 38;
Black on Judgments, Sec. 106.

It therefore appearing that the formal order must be considered as entered on the same day the verdict was rendered, it is immaterial which of the possible constructions indicated above is correct for in any case the statutory bond was not filed within the ten days following, its filing date being June 8, 1904. The result is that the defendants did not comply with the provisions of the statute even on the theory advanced below by themselves,—the strongest possible theory in their own favor.

D. Defendants' failure to file the bond required was fatal.

It may be contended by defendants (plaintiffs in error here) that the failure to file the bond in question did not affect the jurisdiction of the trial court to pass upon the motion; that the bond is not to be considered as a prerequisite to the motion or

as even necessary in connection with the motion; that its purpose is to furnish the successful party security against the removal of property subject to execution from the jurisdiction of the court, pending appellate proceedings and further, that in any event it is a requirement which can be waived by the other party and in this case that it was waived.

It is contended by the Territory, as pointed out above, that the giving of a bond is made by statute an absolute prerequisite to the making of a motion for a new trial. The cases in the Hawaiian reports, to which attention is above called, hold this to be the rule in Hawaii. Whatever may be the rule in other jurisdictions under statutes similar to the one under consideration, and whatever may be the rule at common law, it is the law of Hawaii as established by statute and judicial precedent, that the filing of the bond is a necessary prerequisite to the making of a motion for a new trial and that the failure to file a bond within the ten days prescribed by statute following the verdict or judgment, deprives the trial court of any authority or power to consider and pass upon the motion.

Jolira v. Kaulukou, 7 Haw. 731;
Ferreira v. H. R. T. & L. Co., 16 Haw. 797;
Harrison v. Magoon, 16 Haw. 170, 179.

Certainly the judge could not extend the time fixed by statute.

Kapiolani Estate v. Peck, 14 Haw. 580;
Kapiolani Estate v. Thurston, 16 Haw. 147.

The rule so clearly laid down by the decisions of the Hawaiian Supreme Court effectually disposes of any contention that the giving of the bond is not necessary before the motion is made and considered. The only theory upon which this construction could be sustained is that the object of the bond is merely to prevent the issuance of an execution upon the judgment. To

so construe Section 1805 of the Revised Laws of Hawaii is to do violence to the wording of that section, and to read into it matter that is not present. This section provides for the procedure to be followed when a party against whom a verdict or judgment has been rendered desires to move for a new trial. It does not purport to, nor was it intended to cover, primarily, the matter of a stay of execution. Provision is made in the preceding section, that is, in Section 1804 R. L., that judgment be entered by the clerk immediately upon the rendition of a verdict or of a judgment of the court, and that execution may issue at any time thereafter upon such judgment, unless notice is given at the time of rendering the verdict or judgment of a motion for a new trial, the filing of a bill of exceptions and of a bond, as required by statute. Reading the two sections together, therefore, it appears that Section 1804 covers the matter of staying execution, or in other words, makes it possible for the person against whom the verdict or judgment has been rendered to prevent the issuance of an execution pending a review by an appellate court. The chief object and purpose of Section 1805 is to lay down the method of procedure which must be followed if a motion for a new trial is made. No conflict exists between the two sections, and effect can and should therefore be given to the purpose expressed in each. The requirement that a bond be filed within ten days after rendition of a verdict or judgment, as a necessary prerequisite to the making of a motion for a new trial, was designed as much to prevent frivolous and vexatious litigation, as a matter of sound public policy, as it was designed to give to the successful party litigant security for the collection of his judgment while appellate proceedings were pending. This view has been adopted in Massachusetts under a similar statute.

Santom v. Ballard, 133 Mass. 464;
Henderson v. Benson, 141 Mass. 218.

The procedure outlined in Section 1805 is the only method under the laws of Hawaii whereby a motion for a new trial can properly be made. If there were no special statute on the subject, doubtless the common law rule would prevail, inasmuch as by Section 1 of the Revised Laws of Hawaii, formerly Section 5 of Chapter 57 of the Session Laws of 1892, the common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory in all cases except as otherwise expressly provided by the Constitution or Laws of the United States, or by the laws of the Territory of Hawaii, or as fixed by Hawaiian judicial precedent or established by Hawaiian usage. At common law, no bond was required as a prerequisite for the making of a motion for a new trial. Section 1805 of the Revised Laws was originally passed as Section 1156 of the Civil Code of 1859. Therefore, at the time that the common law was by statute declared to be applicable in Hawaii, the method by which a new trial could be had was provided by statute. It is therefore unnecessary to consider whether or not this method is in conflict with that of the common law, because the statute adopting the common law expressly excepts from the operation of its rules, all matters as to which provision had otherwise been made by the Hawaiian statutes.

The wording of Section 1805, when considered carefully, would seem to indicate that the method therein provided for the making of a motion for a new trial, is exclusive. The words "any person" clearly intend "every person," following the usual rule of construction that words in the singular or plural number can and should be construed to include the other number respectively whenever the context seems to require it. The very fact that the section under consideration has been the law of Hawaii since 1859, and was, until the passage of the statute adopting the common law in 1892, the only possible method of

obtaining, on motion, a new trial, strongly aids the construction that the word "any" as used, was intended to include every person. Section 1805 merely grants permission to the unsuccessful party litigant, upon certain conditions and terms, to make a motion for a new trial. It very naturally does not require that a person shall make such a motion, and as worded, fairly intends and should be construed to mean that any person against whom a verdict or judgment is rendered, etc., if he desires to move for a new trial, shall before being permitted to do so, file a sufficient bond of security, etc. The conclusion of this matter is, therefore, that the rule in Hawaii as to the making of a motion for a new trial is that before being permitted to do so, the moving party shall comply with the conditions outlined by the statute authorizing such a motion, and that a failure on his part to comply in all respects with such conditions is fatal.

See Hawaiian cases, supra.

E. The filing of a bond was as a matter of fact not waived, even if as a matter of law it could have been waived.

If the argument which has already been made to the effect that the filing of the bond is a necessary prerequisite to the motion, is sound, then it would follow that only after the filing of a bond would the circuit court have power to hear and determine the motion. But assuming for the time being that such a noncompliance with the statute is not of such a character as to absolutely divest the court of jurisdiction and that it is a defect or irregularity which can be waived by counsel, it is submitted that no waiver can be shown to have been made in this case. The record certainly fails to show an express waiver. If, therefore, there was any waiver it must have been by implication and it must have arisen from the action of the Deputy Attorney General, counsel for plaintiff, with regard to the motion for a new trial.

A waiver by implication of a possible objection, must in gen-

eral be shown either by laches or by inconsistent action of such a character as to show an intention not to rely upon the objection. In this case the claim of waiver is predicated upon the failure of the Deputy Attorney General to appear in court on June 3rd in response to the notice of the motion for a new trial and upon his message to the court that day. Just what the fact was is shown of record only by the affidavit of defendants' counsel attached to the motion to extend time for filing the bond. (Tr. p. 13.) In this affidavit appears the following statement:

> "That said motion was set for argument on Friday, June 3rd, such being the eighth day after said verdict was rendered; that at the time set for argument of said motion, defendants' counsel appeared, but plaintiff's counsel sent word to the court that he was not ready, being otherwise engaged; whereupon argument on said motion was postponed at the request of plaintiff's attorney until this Tuesday, June 7th, at which plaintiff's attorney moved that defendants' motion be dismissed for failure to file a bond as above mentioned, having given no intimation previously of his intention so to do.
>
> "Wherefore this affiant respectfully submits that he waived the same."

It is fair to assume that this affidavit was drawn with the intention on the part of counsel for defendants of presenting as strong a statement in his own favor as was possible. No intimation is made that there was any laches on the part of plaintiff's counsel, nor can laches be charged in presenting on June 7, eleven days after verdict, as an objection to the motion for a new trial, the claim that the bond required had not been filed within the ten days allowed. Therefore, in order to make out a waiver, it is necessary to find that the conduct of plain-

tiff's attorney was so inconsistent as to show an intention on his part not to raise this objection.

The affidavit is at best ambiguous, if it was intended to show either that plaintiff's counsel consented to an argument of the motion upon its merits or that he appeared and thereby admitted the power and jurisdiction of the court to pass upon the motion by requesting a continuance. It appears that plaintiff's counsel did not actually come into court at all, but that he sent word to the court that he was not ready, being otherwise engaged. The affidavit shows that a request for a continuance was made by plaintiff's counsel, but there is nothing to show that such request was made with any intention either to present argument upon the merits of the motion alone, or to waive any objection which could properly be made to the hearing of such motion. The most natural construction is that since counsel for plaintiff was otherwise engaged, he merely requested that the entire matter might stand over to some subsequent time. It is certainly doubtful whether the date, June 7, was selected by the court at the request of plaintiff's counsel or by the court of its own motion, or by the court with the consent and acquiescence of defendants' counsel. It is more than likely that the court set the date itself with the concurrence of counsel present before it and that plaintiff's counsel did not specify any particular date to which he desired that the hearing should be continued. Nothing appears of record to show that either plaintiff's or defendants' counsel, or the court, made any allusion whatever to the merits of the motion, or that there was any intention on the part of plaintiff's counsel to agree, in consideration of the continuance, to argue the motion upon its merits; nor does anything appear of record to show that on June 3, for which date the motion was noticed, plaintiff's counsel knew that a bond had not been filed. Whether he knew of this fact or not, it certainly cannot be said to have been his duty to have called to the atten-

tion of defendants' counsel his failure to perfect his motion. Waiver is a matter of intention and what is there in a mere request for a continuance, assuming that such request was made, to show an intent to waive any objection which could properly be made to the granting or to the hearing of the motion for a new trial? So far as abandoning any intention is concerned, if on June 3 plaintiff's counsel had such intention to object on the ground that defendants had failed to file the statutory bond, it appears that on June 7, to which time the hearing on the motion had been continued, plaintiff's counsel appeared and immediately objected to a consideration of the motion upon this ground and argument was had as to the merits of such objection. It does not appear of record that any contention was then made by defendants' counsel that a waiver of the objection had taken place and such contention does not appear to have been made until after argument had been had upon the merits of such objection. It is therefore as reasonable to claim that defendants waived their objection of laches or inconsistent conduct as it is to claim that plaintiff waived its objection of no bond merely because it did not make such objection on June 3.

There is nothing either in the decision of Judge Gear or in that of Judge Lindsay to show that in the opinion of either of them there had been a waiver. Judge Gear knew all of the facts and instead of finding that there had been a waiver, entertained jurisdiction of the motion upon the express ground that the bond was filed in proper time (Tr. p. 43). It would appear from his action in view of his knowledge of the facts, that the construction which he placed upon the affidavit was that there had been no waiver.

Many courts hold that, although formal or technical defects may be waived, substantial defects such as the want of a surety cannot be waived either by implication or by an express waiver,

for the reason that jurisdiction conditional upon compliance with statutory requirements cannot be conferred by consent.

Ten Brook v. Maxwell, 5 Ind. App. 353;
Lyell v. Guadaloupe, 28 Tex. 57;
Santom v. Ballard, 133 Mass. 465;
Henderson v. Benson, 141 Mass. 218;
Marx v. Lewis, 24 Nev. 306, 53 Pac. 600;
Cape Fear, etc., Co. v. Costen, 63 N. C. 264.

The rule in Hawaii seems to be that defects of this kind may be waived by express stipulation.

Spooner v. Rice, 11 Haw. 429;
Estate of Kamakela, 12 Haw. 264;
Hind v. Wilder S. S. Co., 14 Haw. 219.

The appearance of counsel in court to urge this objection certainly was not by implication a waiver of it, nor could his request for a continuance of the entire hearing, standing as a single fact, be fairly considered as such.

Even a general appearance is not a waiver when the statutory requirements as to the filing of a bond on appeal have not been complied with.

Santom v. Ballard, 133 Mass. 464.

And the approval by counsel of a defective bond is not a waiver.

Henderson v. Benson, 141 Mass. 218.

Nor will an agreement of submission waive a statutory requirement.

Ten Brook v. Maxwell, Admr., 5 Ind. App. 253.

In *Little v. Jack*, 68 Cal. 343, it was held that an appellee did not waive a right to a dismissal of the appeal for want of an appeal bond by stipulating to advance the appeal on the calendar for hearing, the court saying:

"There has been no such waiver in this case, unless the stipulation to have the case placed on the calendar out of its order for hearing constituted it. There is no allusion in the stipulation to the undertaking, and nothing to indicate an intention to waive it. By no rule of construction could it be held to be a written consent of respondent to waive the filing of an undertaking." In a concurring opinion it was said: "It does not appear that the respondent's counsel, when he signed the stipulation, contemplated giving such consent. The stipulation above mentioned was signed with another and different object and intent and to predicate of it that it consented that no undertaking on appeal should be filed would be to attribute to it an intent entirely foreign to the intent for which the stipulation was entered into, and which was in the minds of the parties when it was executed. Where an intent plainly appears, another and a different one cannot be implied."

See also:

Howard v. Maisch, 52 Texas 60;

James v. Dexter, 112 Ill. 489;

Babb v. Cain, 37 Kansas 692, 16 Pac. 89;

Killip, Admr., v. Empire Mill Co., 2 Nev. 34, 40 and 41.

In view of this conclusion, it is unnecessary to consider whether the rights of the Territory could in any event be affected by an attempted waiver of some statutory provision by an executive officer, although the rule was adopted in Hawaii in the case of *Peacock v. Republic*, 11 Haw. 404, that such a waiver could not be made.

The finding of the Supreme Court of Hawaii that there was no waiver in this case is a finding of fact and therefore is conclusive upon this court.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305;
Behn, Meyer & Co. v. Campbell, 205 U. S. 403, 51 L. ed. 857.

F. Nor can the action of the court be regarded as taken upon its own motion.

Neither the action of Judge Gear nor that of Judge Lindsay can properly be considered as having been upon the independent motion of the Court. Judge Gear heard and took under advisement the motion of defendants for a new trial. In rendering his decision, nine months later, he states that in his opinion, the motion should be granted. The cablegram sent by him also states "Order motion for new trial granted. Grounds mailed." The "grounds mailed" were doubtless the written decision referred to. It therefore appears clear that his action was predicated entirely upon the motion made by defendants. But even if it could be considered that the action of Judge Gear was an attempt to grant a new trial on his own motion, such order could not stand for the reason that it was not made in time. It has never been decided in Hawaii that a trial judge can of his own motion grant a new trial after the ten day limit prescribed by statute for the filing of a motion for a new trial. In the United States, the usual rule is that except under special and peculiar circumstances, a court loses control over its judgments after the expiration of the term at which they are made.

Deering v. Creighton, 26 Ore. 556;
Killip, Admr., v. Empire Mill Co., 2 Nev. 44, 45;
Freeman on Judgments, (3rd Ed.) Sec. 96;
Michigan Ins. Bank v. Eldred, 143 U. S. 293, 36 L. ed. 162.

In this case the action of Judge Gear was taken nine months after the verdict had been rendered and judgment entered and during the latter part of the second term of court after the verdict and judgment.

Similarly, the action of Judge Lindsay in signing the formal order granting the motion for a new trial cannot be said to have been taken on his own motion for several reasons. The order itself is entitled "Order Granting Defendants' Motion for a New Trial," and after reciting that the defendants had made such a motion and that the court had duly considered it, concludes, "said motion is granted; and it is therefore and hereby ordered that in the above entitled action, a new trial be had." (Tr. p. 33.) Furthermore, this order was made entirely too late and at an improper time, if it is to be considered as made of the court's own motion, for it appears that the order was made in vacation and after the lapse of three terms after the term at which the verdict was rendered and judgment entered. It was, in fact, made more than one year after such verdict and judgment. A third objection to considering that Judge Lindsay's action was of his own motion, is that the granting of a new trial upon the court's own motion is a discretionary matter. The motion upon which Judge Lindsay's order was based shows that no discretionary action on the part of the court was requested, but on the contrary, that a formal order granting the new trial in pursuance of the decision of Judge Gear was asked. (Tr. p. 32.) Judge Lindsay could not exercise a proper discretion inasmuch as the trial was not had before him, nor was there a proper record.

From these considerations, it appears that the action of neither Judge can properly be considered as discretionary and from the considerations which have been already advanced above, it follows that this action, to wit, that of the two trial judges, must be considered as a new proceeding and therefore subject to appellate review.

G. The action of Judge Gear was invalid because done outside of the Territory or after his term of office had expired.

In deciding the question of the validity of the order of new

trial, the Supreme Court of Hawaii found it unnecessary to pass upon the objection made that Judge Gear's order was in any event invalid, inasmuch as it was rendered by him when absent from the Territory. This objection, however, it is submitted, was well taken and because of the absence of Judge Gear, his decision, if it does not fail of validity for any other reason, was invalid because it was rendered outside of the Territory. The record shows that this action was taken by the Judge when in California. (Tr. p. 21.) There can be no question that the action of Judge Gear, both in cabling to the Clerk of the Circuit Court, and in writing and mailing his decision to the effect that in his opinion, the motion for a new trial should be granted, was an attempted exercise of judicial functions.

Hake v. Strubel, 121 Ill. 325;

S. & M. Ry. Co. v. B. & E. Ry. Co., 29 Wash. 491, 69 Pac. 1107;

Wulzen v. San Francisco, 101 Cal. 15;

Central Pacific R. R. Co. v. Gallatin, 99 U. S. at 761, 25 L. ed. at 516.

By Section 81 of the Act to Provide a Government for the Territory of Hawaii, approved April 30, 1900, (31 Stat. at Large, 141) it is provided:

> "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the Legislature may from time to time establish and until the Legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure, shall continue in force except as herein otherwise provided."

Chapter 113 of the Revised Laws of Hawaii outlines the

procedure and jurisdiction of the circuit courts of the Territory. By Section 1638, of the Revised Laws, a court to be called a circuit court is established in each of the judicial circuits of the Territory. By Section 1637 R. L., the Territory is divided into five judicial circuits. Provision is made by Section 1639 R. L., for three judges of the circuit court of the first circuit. By Section 1642, every judge of the circuit court is required to reside in the circuit for which he is appointed. The terms of the respective circuits are required to be held, by Section 1644 of the Revised Laws, upon certain dates and within their respective circuits. By Section 1647 R. L., the jurisdiction of the circuit court is outlined, and in this Section is contained the following provision:

> "Any circuit court may, upon satisfactory proof that a fair and impartial trial cannot be had in any case pending in such court, and after the parties thereto shall have had opportunity to be heard, change the venue to some other circuit court and order the record to be transferred thereto; provided, however, that any circuit court may, in its discretion, upon the consent of all of the parties to any civil cause pending in such court, change the venue to some other circuit court and order the record to be transferred thereto."

These various provisions, when considered together, clearly indicate that the jurisdiction of each circuit court is limited to its respective judicial circuit in all ordinary cases, and it was even thought necessary to provide specially for a change of venue from one circuit to another. It is even more apparent that such courts cannot perform judicial functions when away from the Territory.

As a matter of general law, it is settled that judicial action attempted to be taken outside of the territorial limits of the jurisdiction of the court is a nullity, because such action derives

its force from the laws of the state, and such laws have no extra territorial operation, being co-extensive with the territory within the State.

Capper v. Sibley, 65 Ia. 754;
Lee v. Wells, 81 Mass. 459;
State v. Parsons, 115 N. C. 730, 20 S. E. 511;
State v. Ray, 97 N. C. 510, 1 S. E. 878;
Bedwell v. Ross, 12 Okla. 507, 73 Pac. 267;
Buchanan v. Jones, 12 Ga. 612;
Dunn v. Travis, 45 Kansas 541, 26 Pac. 247;
Price v. Bayless, 131 Ind. 437;
Stanley v. United States, 1 Okla. 336, 33 Pac. 1025.

Judge Gear's term of office was for four years from March 2, 1901. (Tr. p. 62.) It therefore follows that his term expired four years thereafter, that is, at midnight on March 2, 1905, if not at midnight on the preceding day.

Section 80 of "An Act to Provide a Government for the Territory of Hawaii," approved April 30th, 1900; 31 Stat. at Large, 141 at 156.

Therefore, at the time of the receipt by the clerk of the written decision of Judge Gear, to wit, March 4, 1905, (Tr. p. 32), the term of office of Judge Gear had expired. This written decision cannot be considered to have been the decision of the court until it was received and filed, inasmuch as up to the very date of its filing, by virtue of the cable connection between the Territory and the mainland, it would have been subject to recall, change, or modification by the Judge.

Where the term of office of a judge has ceased, his decisions subsequently filed will not support a judgment.

Cain v. Libbey, 32 Minn. 491.

It is held that a court cannot make in vacation an order in a term case without the consent of the parties.

Bynum v. Co. of Burke, 97 N. C. 374, 2 S. E. 170.

A decision on a motion for a new trial after the resignation of a judge has been held void.

Griffing v. Danbury, 41 Conn. 96;

See also:

Wallace v. Harris, 32 Mich. 378;

Smith v. Baugh, 32 Ind. 163, 167;

Ketchem, Adm'x., v. Hill, 42 Ind. 64;

United States v. Alexander, 46 Fed. 728.

It is therefore submitted that the attempted action of Judge Gear with regard to the motion for a new trial was, as a matter of law, absolutely void.

II. The writ of error properly brought up for review the formal order of new trial and the decision on which it was based.

It remains to consider the effect of the writ of error upon the action of Judge Lindsay in making the formal order granting the motion for a new trial and whether by this writ the entire proceeding relative to the granting of the new trial came properly before the Supreme Court. The formal order was made the subject of direct attack by means of the writ of error sued out in the Supreme Court of Hawaii on January 17, 1906, (Tr. pp. 56 and 61), the order itself having been made on July 18, 1905. (Tr. p. 33.) By Section 1869 of the Revised Laws of Hawaii, it is provided:

> "A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge, or magistrate, or by the decision of any court except the Supreme Court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of the judgment."

It was contended in the court below, and may be contended here, that the Supreme Court of Hawaii had no jurisdiction, upon the writ of error, over the order granting a new trial, because that order was, as a matter of fact, made by Judge Gear on February 27, 1905, and the writ did not issue until January 17, 1906, more than ten months thereafter. In making this contention, defendants argued before the Territorial Supreme Court that Judge Lindsay's order of July 18, 1905, was merely a formal drawing out of the actual order rendered by Judge Gear or, in other words, a ministerial act which related back, necessarily, to the judicial act previously done.

It was conceded by defendants, before the Supreme Court of Hawaii, when this question was presented, that the attack upon Judge Lindsay's order was direct, such order being the subject of the writ of error, and that the writ of error was brought in time to review such order. The Supreme Court held that such order could only be regarded as based upon or made in pursuance of the decision of Judge Gear; that it could not be considered independent from the decision; and that the writ of error brought within time to review the order, necessarily brought up for review the decision upon which that order was based. (Tr. pp. 76 and 77.)

For the following reasons, it is now urged that this decision of the Territorial Supreme Court was correct:

First:—Judge Gear's action was not final either in form or in the view of counsel and the court.

Second:—The decision of Judge Gear was the basis of Judge Lindsay's order, and therefore the direct attack on the order was a direct attack on the decision.

Third:—Until the entry of Judge Lindsay's order, there was no such final order or judgment of record as could be made the basis of a writ of error.

It is evident from the record that counsel for the defendants, plaintiffs in error here, did not consider that either the cablegram received from Judge Gear, or the entry on the minutes of such cablegram made by the clerk on February 27, 1905, entitled them to a new trial. They moved, on April 14, 1905, for the entry of a formal order granting them a new trial, basing such motion upon the record, including the decision of Judge Gear. (Tr. p. 32.) It is evident from this action, that defendants' attorneys considered both the cablegram and the written opinion as constituting memoranda only by the aid of which a formal order or judgment, which would operate to give to them the new trial desired, could be drawn out and formally entered. It must be assumed that defendants' counsel were thoroughly familiar with the practice in the Territorial courts, which certainly requires the formal entry of an order in writing granting a new trial before such trial can be had. They evidently considered it necessary, in order to secure such trial, that a formal order be entered by the court, setting out the essential facts upon which such action must be predicated. If the cablegram of Judge Gear was considered by defendants as such an order, there would have been no reason for their moving before Judge Lindsay for the entry of a formal order. The construction, therefore, which was placed upon this cablegram by defendants' counsel and by the court, Judge Lindsay sitting, was that it was nothing more than an expression of the opinion of the court, to the effect that an order for a new trial should be made.

The only formal order granting a new trial is that of Judge Lindsay, rendered and entered on July 18, 1905. (Tr. p. 33.) As is argued by the Supreme Court of Hawaii, in its opinion rendered upon the writ of error, (Tr. p. 77), this formal order of Judge Lindsay was directly attacked by the writ of error. It must be regarded as based upon the decision of Judge Gear, regarding the motion for a new trial, for if it is to be regarded

as in response to the motion made for its entry, then it fails of validity, because such motion was made long after the time permitted by statute, and was not a motion for a new trial in form, and if it is to be regarded as discretionary, it is invalid because, on account of the lapse of time after the rendition of the verdict, the court could not vacate and set aside the verdict.

A writ of error, in bringing up for review a final judgment, necessarily brings up for review the proceedings and record upon which such judgment is predicated. Inasmuch, therefore, as the attack upon Judge Lindsay's order was a direct attack, it follows that the attack made by the writ of error upon Judge Gear's decision was likewise direct.

The only theory upon which it can be contended that the six months period, within which a writ of error could be brought, had lapsed prior to January 17, 1906, is that the entry of the formal order of July 18, 1905, was a nunc pro tunc entry, relating back to the time of the filing or rendition of the decision of Judge Gear. If it is to be considered, as the Territory submits it should be considered, that the action of Judge Gear with regard to this motion for a new trial consisted merely in the expression of an opinion, then it follows that no judgment was rendered granting the new trial until July 18, 1905, that being also the date on which such judgment was entered. It certainly would be trifling with justice for a party litigant to be permitted to delay the securing of a formal judgment until more than six months after his right to that judgment had been announced by the court, and then to be allowed, in an appellate proceeding, to contend that no writ of error could run to such judgment, because it related back to a date more than six months prior to its entry, and that therefore the appellate court had no jurisdiction to review the matter.

It is to be noted that the order of Judge Lindsay does not purport to have been made as of any prior date. It is dated at

Honolulu, on the 18th day of July, 1905, and filed on the same day. It was, as already pointed out, entered at the request of defendants' attorneys. For the purposes, therefore, of this case, there seems to be no reason for regarding this order as relating back to some prior time, and for defendants' attorneys to now seriously contend that such is the law of the case, is, it is submitted, an attempt on their part to strengthen a weak case by raising the most minute technical questions which can be found. There is no reason whatever for considering this order or judgment of Judge Lindsay as having been made at any time prior to the exact date on which it was made, and the courts will not permit a judgment to be entered as of an earlier date than it is actually made for the purpose of shortening the time in which a writ of error can be taken out. The rights of the parties are determined by the date of the actual entry.

Rubber Co. v. Goodyear, 6 Wall. 156, 18 L. ed. 762;
Wheeler v. Harris, 13 Wall. 56, 20 L. ed. 531;
Coon v. United Order, etc., 76 Cal. 355, 18 Pac. 384;
Bickel v. Dutcher, 35 Neb. 765, 53 N. W. 664;
Martin v. Smith, 11 S. Dak. 437, 78 N. W. 1001;
Silsby v. Foote, 20 How. 290, 15 L. ed. 822;
Heirs of Ludlow v. Johnston, 3 Ohio 553, 577;
Milwaukee v. Pabst, 64 Wis. 244, 25 N. W. 11.

Furthermore, until the entry of Judge Lindsay's order, there was no such judgment of record in this case, granting the motion for a new trial, as could be made the subject of a writ of error.

Bickel v. Dutcher, 35 Neb. 761, 765;
Exley v. Berryhill, 36 Minn. 117;
Milwaukee v. Pabst, 64 Wis. 244, 25 N. W. 11;
Rubber Co. v. Goodyear, 6 Wall. 156, 18 L. ed. 762.

The language used by Judge Gear in his cablegram shows that

a further order was contemplated. Whether it was the intention of the Judge that such order should be made by his clerk or by his successor does not appear, but it does appear that instead of granting the motion for a new trial, he chose to say that he ordered that a new trial should be granted. This, therefore, was not such final action on his part as would have warranted the issuance of a writ of error.

> "The entry must not only indicate what adjudication took place, but should also appear to have been intended as the entry of judgment, and not as a mere memorandum by the aid of which the formal record was to be constructed."
>
> *Freeman on Judgments*, (3rd Ed.) Sec. 52.

So far as the entry of the clerk upon the minutes of the court was concerned, such entry was merely a ministerial act, copying into the records the cablegram received from the Judge. It cannot be considered as of any greater effect than the cablegram.

It therefore follows that the only judgment to which a writ of error could run was the order made by Judge Lindsay, and the only reason for the contention that this order is not to be considered as actually made on July 18, 1905, is to make it possible to now contend that the Supreme Court lacked jurisdiction over it upon error.

The obvious intent of the court and counsel as shown on the face of the record was that the order of Judge Lindsay was the final and formal act which was necessary if a new trial was to be secured, and this intent is conclusive as to the time during which a review by error could be had.

> *Rubber Co. v. Goodyear*, 6 Wall. 156, 18 L. ed. 762;
> *Harvey v. Wait*, 10 Ore. 121.

Although no direct decision appears to have been made by

the Hawaiian Supreme Court upon the question whether the time within which a writ of error may be issued runs from the date of the rendition of judgment as distinguished from the date of entry, still, it is submitted that the practice in Hawaii has been to consider that the time ran from the date of the entry of the formal judgment.

Tibbits v. Pali, 15 Haw. 137 at 138;
Cummins v. Iaukea, 10 Haw. 1 at 3;
Bowler v. McIntyre, 9 Haw. 307.

In this latter case, the court speaks upon the matter as follows, although the exact question was probably not before the court:

> "The judgment was entered February 25, 1893. The writ was issued August 25, 1893. The statute allows the writ to be issued within six months from the rendition of judgment. We think that this writ was issued within the time prescribed by the statute."

In the late case of *Notley v. Brown*, 17 Haw. 455, the exact point now under consideration was raised by means of a motion to quash a writ of error, one of the grounds for such motion being that the writ had not been issued within six months from the rendition of judgment. It appeared that on January 29, 1903, the Judge presiding signed and filed an order, dated January 28, 1903, directing the clerk to enter judgment in favor of the opponents of the will of Charles Notley, in accordance with the verdict rendered. A judgment in accordance with said order was filed on January 29, 1903, but not signed by any one, bearing merely the endorsement of the clerk that it had been filed. On June 8, 1905, defendants in error moved that the clerk be ordered to sign the judgment which had been filed on January 29, 1903, which motion was granted without prejudice to the pending motion of plaintiffs in error to vacate

the order filed January 29, 1903, and accordingly, the judgment was signed on that day, to wit, June 8, 1905, as of the 28th day of January, 1903. The writ of error in this case was issued within six months after June 8, 1905, but not within six months from January 28, 1903. Upon this state of facts, a motion was made to dismiss the writ on the ground that it had not been issued within six months after judgment rendered. In passing upon the motion, the majority of the court found it unnecessary to decide this question, inasmuch as the motion was granted upon an entirely different ground, merely saying that there was force in the objection, and that the words "rendition" and "entry" of judgment had been used more or less interchangeably by the court in some of the past cases. The dissenting opinion, written by Justice Hartwell, now Chief Justice of the Supreme Court of Hawaii, states, it is submitted, the rule which is applicable to this question. He says, at page 460:

> "I think that the motion cannot be granted on either of the grounds named. The judgment was not rendered in such form that a writ of error would lie to it until June 8th, 1905. A judgment cannot be made 'as of' an earlier date than it was actually made for the purpose of shortening the time in which a writ of error can be taken out. *Rubber Co. v. Goodyear*, 6 Wall. 156. The only object of a nunc pro tunc judgment is 'to see that the parties shall not suffer by the delay.' *Mitchell v. Overman*, 103 U. S. 65. It 'should be granted or refused as justice may require, in view of the circumstances of the particular case.'"

It is therefore submitted that the jurisdiction of the Supreme Court, upon the writ of error issued, to consider and pass upon all of the matters involved in the granting of a new trial was complete.

I. But if it be considered for any reason that the Supreme

Court of Hawaii did not have jurisdiction by this writ to review the decision of Judge Gear, then it is urged that such review constitutes harmless error only.

If the Supreme Court of Hawaii acted without jurisdiction in overruling the order granting a new trial, then, since its action was void, the decision of Judge Gear, granting the order of new trial, would stand as the last judicial act in the case. Unless this court should go further and hold that his decision was correct, the result would be as follows: A new trial would be had, with either the same result as the last trial, or a judgment against the Territory. If the result should be, as in this case, a verdict and judgment against the defendants, then they would be in no better position than at present. If, on the other hand, judgment should go against the Territory, then the right and power of Judge Gear to order the new trial could and would be challenged by including in a bill of exceptions, the exception taken to such order. On this bill the ruling of the Territorial Supreme Court upon this question would presumably be the same as the ruling already made, and the result to defendants would be that the present verdict and judgment would stand.

It is therefore obvious that all rulings of the Hawaiian Supreme Court with respect to this phase of the case, except its ruling that Judge Gear lacked the requisite power to order a new trial on account of a lack of compliance with statutory requirements, even if erroneous, are harmless error. This court, therefore, should disregard them, and decide this matter as justice between the parties requires.

The important question in the case is the question of construction arising on Section 1805, Revised Laws of Hawaii. And as has been pointed out above, the decision of the Supreme Court of Hawaii that under this section the filing of the bond is a necessary prerequisite to the motion, and that failure to file it deprives the court of power to act on the motion, is a decision

which is conclusive on this court, because it is a matter of construction only.

Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 618, and cases supra.

IV.

THERE WAS NO ERROR EITHER IN REFUSING TO CONSIDER THE EXCEPTIONS SET OUT IN DEFENDANTS' AMENDED BILL OF EXCEPTIONS OR IN OVERRULING THE EXCEPTION TO THE VERDICT AS CONTRARY TO THE LAW AND THE EVIDENCE.

It will be noted that two different rulings were made by the Hawaiian Supreme Court with regard to the Bill of Exceptions brought by defendants before it. Upon motion made by plaintiff to dismiss the amended bill of exceptions, the court held that only the exception properly incorporated in the original bill of exceptions presented to the trial court, June 8, 1904, could be considered. The motion to dismiss was accordingly denied, inasmuch as this exception was included in the amended bill of exceptions allowed on May 3, 1906. (Tr. pp. 17 and 89.) It is at best doubtful whether this court will now consider and review the ruling of the Hawaiian Supreme Court upon this motion to dismiss, in view of the assignment of errors made by counsel for plaintiffs in error. As already pointed out in the statement of the case, two assignments of error have been made, the first of which was filed with the petition for the writ of error on October 4, 1906. (Tr. pp. 163 to 168.) In this assignment, the action of the Supreme Court in refusing to review or consider the exceptions contained in the amended bill other than that taken to the verdict is assigned as error. (Tr. p. 163.) On February 14, 1907, a new assignment of errors was, however, filed by the attorney for plaintiffs in error, setting forth six alleged errors. (Tr. pp. 176 and 177.) In this later

assignment, no mention whatever is made of the action of the Supreme Court in refusing to consider exceptions other than the one to the verdict. It therefore may fairly be inferred that plaintiffs in error have abandoned their desire for a review of this phase of the case.

Behn, Meyer & Co. v. Campbell, 205 U. S. 403, 51 L. ed. 857.

However, if it be considered by the court that this, as well as all other matters involved, can be considered upon this writ of error, it is submitted that the refusal of the Supreme Court of Hawaii to consider any exceptions other than that to the verdict was a correct ruling. The facts upon which this phase of the case depends, are as follows:

Verdict was rendered May 27, 1904. Judgment was entered as of the same day. The original bill of exceptions was filed June 8, 1904, (Tr. p. 17), and it is shown by the affidavit of the trial judge, (Tr. p. 82), the affidavit of the defendants' attorneys (Tr. p. 88), and the evidence of the trial Judge, (Tr. p. 109), and of defendants' attorney (Tr. p. 117), that this bill of exceptions was presented to the trial judge, at any rate, prior to June 15, 1904, and therefore presented within the statutory time. By Section 1864 of the Revised Laws of Hawaii, the time prescribed by statute for presentation of a bill of exceptions is twenty days after final judgment or such further time as may be allowed. On June 9, 1904, upon motion of defendants' attorney, it was ordered that ten days from the date of filing the transcript of record in the case be allowed defendants within which to file a further bill of exceptions as shown by said transcript. (Tr. p. 19.) On June 24, 1904, by stipulation between the parties, made on behalf of the Territory, "without prejudice to all rights of the Territory of Hawaii," the time for filing defendants' bill of exceptions was fixed at ten days from and after the decision of the court on defendants' motion for a new trial. This stipulation received the approval of the trial judge (Tr. p. 20). The printed record fails to show when the

stenographer's transcript of the testimony, which is doubtless the transcript called, in the order extending time, "transcript of record," was filed. Presumably it was filed prior to the making of the stipulation, but in any event it is found as a fact by the Supreme Court in its opinion upon the motion made to dismiss the amended bill of exceptions, that no attempt to amend the original bill was made within either the ten days allowed by order after the filing of the transcript, or within the ten days allowed by the approved stipulation after the decision of the trial court on the motion to amend the bill. (Tr. p. 129.) This finding of fact cannot be disturbed or questioned by this court, and it must therefore be considered that defendants did not present for allowance any further or amended bill of exceptions within the twenty days allowed by statute or within the further time which had been allowed by the court.

A. *Only the exception contained in the original bill could be considered by the court.*

The facts being as stated above, it follows that the trial judge, in allowing the amended bill of exceptions did so erroneously, in so far as new matter shown therein was concerned, and when the matter was presented to the Supreme Court it could not do otherwise than hold that the only exception which could be considered by it was the one taken to the verdict. Inasmuch, however, as that exception appeared in the amended bill, the motion to dismiss such bill could not be allowed:

Section 1864 of the Revised Laws of Hawaii, which covers the matter of bills of exceptions, reads as follows:

> "A party may allege exceptions to any such opinion, direction, instruction, ruling or order, and the same being reduced to writing in a summary mode, and presented to the judge within ten days after the opinion, direction, instruction, ruling or order objected to, and being found conformable to truth, shall be allowed and signed by the judge, but if the judge shall refuse to allow and sign such exceptions, the truth of the

allegation therein contained, may, nevertheless, be established before the supreme court, and the exceptions allowed by it; provided, that further time may be allowed by the judge in his discretion; and provided further, that if such exceptions are reported by a stenographer or entered in the judge's minutes, they need not be written out or presented to or allowed or signed by the judge within such time, but may be written out at the request of the party taking such exceptions, and allowed and signed by the judge and filed with the clerk at any time, and any such exceptions, whether so reduced to writing in a summary mode and allowed and signed by the judge, or so written out whether allowed or signed by the judge or not, or filed with the clerk or not, may at any time within twenty days after final judgment or such further time as may be allowed by the judge be incorporated in a bill of exceptions and presented to the judge, and, being found conformable to the truth, shall be allowed and signed by him, and if he shall refuse to allow and sign the same, the truth of the allegations therein contained, may, nevertheless, be established before the supreme court and the exceptions allowed by it.

"Bills of exceptions upon like terms as to filing bond and payment of costs, may be certified to the supreme court from decisions overruling demurrers or from other interlocutory orders, decisions or judgments, whenever the judge in his discretion may think the same advisable for a more speedy termination of the case. The refusal of the judge to certify an interlocutory bill of exceptions to the supreme court shall not be reviewable by any other court."

The practice is well established in Hawaii that only such exceptions as appear upon the face of a bill can be considered by the court, and further, that a general statement incorporating

in the bill of exceptions various portions of the record, including the stenographer's transcript of the testimony, upon which certain exceptions appear, does not bring before the court such exceptions.

Exceptions and error are proceedings of a very different character. On exceptions, various specific rulings are brought up for review, and only so much of the record as is necessary for considering such specific exceptions is brought before the court. On exceptions, furthermore, the decision usually given is that they be either sustained or overruled, and that such further proceedings as such ruling may require shall be had. On error, the final judgment itself is brought up for review, and specific rulings during the trial of the case, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment in the cause. The entire record comes up upon error, and the judgment of the appellate court is such as the facts and the law applicable thereto may require as shown by the entire case. In the original bill of exceptions, (Tr. p. 17), the only exception appearing directly upon the face of the bill was that taken to the verdict as contrary to the law and the evidence. The following statement appears also in the bill:

> "During the trial of the cause, certain exceptions were taken by the defendants to rulings of the court upon evidence, and also to the giving of certain instructions at the plaintiff's request, as well as to the refusal to give certain instructions requested by the defendants or to giving the same in a modified form; all of which said exceptions were duly taken and allowed, and appear on the transcript of the record made from the stenographer's notes at the trial."

As the Supreme Court of Hawaii said in its opinion upon the motion to dismiss the bill of exceptions (Tr. pp. 129 and 130), this statement is nothing more than a statement that certain exceptions were taken during the trial and allowed, all

of which appear upon the face of the stenographer's notes. No intention to rely upon any of these exceptions is expressed, nor does the statement even attempt to incorporate these exceptions by reference thereto. The only exception directly set out in the bill is, as said before, the one taken to the verdict. As stated above, the rule is settled in Hawaii that only such exceptions as clearly appear upon the face of the bill can be considered by the appellate court.

Kapuakela v. Iaea, 10 Haw. 99;
Fraga v. Portuguese Mut. Ben. Soc., 10 Haw. 128;
Harrison v. Bruns, 10 Haw. 395, at 397;
Dowsett v. Maukeala, 10 Haw. 167;
Mist v. Kapiolani Estate, 13 Haw. 526;
Aruda v. Morton, 17 Haw. 126 at 129;
Harrison v. Magoon, 16 Haw. 332 at 334.

This same rule is followed under the federal practice.

Mich. Ins. Co. v. Eldred, 143 U. S. 293; 36 L. ed. 162, 163.

The Territorial Supreme Court has held that an allowance of additional time within which to present a bill of exceptions, unless made within the statutory twenty days or such further time as has been allowed by the court, is ineffectual.

Harrison v. Magoon, 16 Haw. 170, 172;
Kapiolani Estate v. Peck, 14 Haw. 580.

This rule supports the argument made, for if further time cannot be allowed under such circumstances, still less could an amended bill containing matter not in the original be filed and considered after the time allowed had expired.

It follows, therefore, that the Supreme Court could not consider any of the exceptions contained in the amended bill other than that to the verdict, because in the first place, the attempted amendment of the bill by incorporating new matter was not made within the time allowed under the statute, and because aside from the exception to the verdict, there was nothing to

amend, since the original bill of exceptions filed, showed only this single exception, and did not, in any way, show a desire or intent on the part of defendants to rely upon any of the other exceptions which the record might show.

The rule in regard to the amendment of bills of exceptions is equally well established in Hawaii as the rule with regard to the consideration only of such exceptions as appear upon the face of the bill.

Kapiolani Estate v. Thurston, 16 Haw. 147;
Kapiolani Estate v. Peck, 14 Haw. 580;
Magoon v. Ahmi, 11 Haw. 233.

In the last case referred to, an amendment of the bill of exceptions was allowed in order that the exceptions which appeared upon its face might be fairly and properly available to the excepting party. In allowing this amendment, the court impliedly recognized that the rule in such cases was that only when an exception appears upon the face of the bill, but appears in incomplete form, or in such form as does not make it available, can an amendment of the bill be allowed. And this is the rule which the other cases referred to above lay down clearly. It may be contended that in this case new exceptions were not sought to be incorporated in the bill, but that the amendment was nothing more than a drawing out in formal shape of the exceptions shown by the original bill. As pointed out above, however, this view cannot be sustained on account of the language of the bill of exceptions itself. Nor can it be properly considered that the reference made in the original bill to the "transcript of record," which we will assume refers to the stenographer's transcript of evidence, makes all the exceptions shown by such transcript available to defendants. All that can be claimed for this statement is that it makes available the transcript for the purpose of considering the exception to the verdict as contrary to the law and the evidence. Indeed, the Supreme Court of Hawaii could not have considered this exception without such transcript. To hold that by such a vague and

indefinite statement as this all of the various exceptions which appear throughout this transcript are properly brought up before the appellate court for review, is to lay down a rule of practice which is so loose as to work against the speedy and certain administration of justice. The appellate court should know exactly what questions are relied upon by the party coming before it upon a bill of exceptions, and in order that those questions may properly and fairly be presented, the other party litigant should also know what matters are relied upon by the excepting party.

Michigan Insurance Bank v. Eldred, 143 U. S. 293, 36 L. ed. 163.

The decisions of the Hawaiian Supreme Court, to which attention has above been called, show that the rule is long established and clearly laid down that the party bringing a bill of exceptions before the court for review must present clear-cut and exact issues; that he cannot come before the court and ask for a review upon a vague, general or indefinite exception to some ruling of the court below. In addition to the cases to which attention has above been called, the Territory directs attention to the following:

Fraga v. Portuguese Mut. Ben. Soc., 10 Haw. 128 at 129;

Spencer v. Dodd, 9 Haw. 200;

Ah Lo v. Aiau, 8 Haw. 70.

In the first of the cases above cited, the court says:

> "The object of an exception as contemplated by the statute, is to bring to this court a specific question of law upon which the trial court has erroneously ruled, to the prejudice of the party excepting, and not to enable a party to cast the entire case upon the court for review. Such a loose method of practice is unfair to both the opposite party and the court."

Nor is this rule confined to Hawaii. It is, on the contrary, a rule of very general application:

Curry v. Porter, 125 Mass. 94;
Harriman v. Sanger, 67 Me. 442;
Jones v. Osgood, 6 N. Y. 233, 236;
Walsh v. Kelley, 40 N. Y. 556;
Thrasher v. Tyack, 15 Wis. 281;
Geary v. People, 22 Mich. 220;
Mershon v. National Ins. Co., 34 Ia. 88;
Sequin v. Peterson, 45 Vt. 255, 258;
Mich. Ins. Bank v. Eldred, 143 U. S. 293, 36 L. ed. 162;
Hanna v. Maas, 122 U. S. 24, 30 L. ed. 1117.

Similarly, the rule that an amendment cannot be made except within the time laid down by statute is followed in other jurisdictions than in Hawaii.

Mich. Ins. Bank v. Eldred, 143 U. S. 293, 36 L. ed. 162;
Threde v. Utah, 159 U. S. 570, 40 L. ed. 257, 243.

As a matter of general law, no presumptions are indulged in with regard to the regularity of proceedings by bill of exceptions and the bill must show upon its face compliance with all statutory requirements.

Cloudis v. Bank, 6 Ga. 481, 482;
Evans v. State, 112 Ga. 763, 38 S. W. 78;
Burst v. Wayne, 13 Ill. 664;
Lafollette v. Thompson, 83 Mo. 199;
Stearn v. Leyman, (Ala.), 2 Southern 708;
Byrne v. Allen, 10 Haw. 338.

B. The decisions of the local court on questions of practice are conclusive.

In any event, since the practice with regard to the amendment of bills of exceptions has become well established by the various decisions of the Hawaiian courts, to which attention has been called, construing the statutes relative to bills of exceptions this court cannot now review such rulings. It is well established, as has been stated above, that this court will not review rulings of the local Supreme Court construing local

statutes not in any way in conflict with either the constitution or laws of the United States.

Wilson v. Standefer, 184 U. S. 390, at 412, and cases supra.

It is therefore submitted that no error was committed by the Territorial Supreme Court in refusing to consider any exception except the one taken to the verdict as contrary to the law and the evidence, and which was included in the original bill of exceptions filed.

C. This court cannot review the decision overruling the exception to the verdict as contrary to the law and the evidence.

It remains only to consider the assignment that error was committed by the Supreme Court in overruling this exception. The Territory submits that this court cannot pass upon that assignment for two reasons: First, that the decision of the Supreme Court in overruling this exception depends upon a consideration of matters of fact, and the decision of the territorial court as to matters of fact is final and not subject to review by this court.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680;
Dower v. Richards, 151 U. S. 658, 38 L. ed. 305;
Chicago, etc., R. R. v. Chicago, 166 U. S. 246, 41 L. ed. 988;
Hedrick v. Atchison, 167 U. S. 673, 42 L. ed. 319, 322;
Turner v. New York, 168 U. S. 95, 42 L. ed. 394;
Behn, Meyer & Co. v. Campbell, 205 U. S. 403, 51 L. ed. 857.

Second, the evidence taken before the trial court, and upon which the verdict of the jury was based is not included wholly in the printed transcript of record which is now before this court. It, therefore, would be impossible for this court to say, assuming that it would undertake in any event to do so, that

the verdict was contrary to the evidence presented. And in view of the omission to print this portion of the record and include it in the transcript before this court, it is equally impossible for this court to say, making the same assumption, that the verdict was contrary to the law applicable to the facts proved. Furthermore, it is also impossible, in view of this omission, for this court to say that the instructions of the trial court, which are included in the printed transcript of record, (Tr. pp. 7 to 10), did not fully and fairly set forth the law of the case. The conclusion is, therefore, that this court is bound upon the record by the final decision of the Supreme Court of Hawaii overruling the exception taken to the verdict as contrary to the law and the evidence, which decision was reached after a careful review of all of the evidence in the case, as shown by the elaborate opinion filed by the Chief Justice of the Court. (Tr. pp. 143 to 155.)

Since it is clear that the decision of the Hawaiian Supreme Court was correct upon the whole case, the Territory now asks that the writ of error issued herein be dismissed, and the judgment sustained.

Honolulu, September 2nd, 1908.

Respectfully submitted,

C. R. Hemenway

Attorney General of Hawaii.